90-495

No. _____

In The

Supreme Court of the United States

October Term, 1990

MAGEE DRILLING COMPANY,

Petitioner,

versus

ARKOMA ASSOCIATES, ET AL.

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

RICHARD K. INGOLIA*
KENNETH J. BERKE

BERKE & INGOLIA
A Professional Law Corporation
200 Oil & Gas Building
1100 Tulane Avenue
New Orleans, Louisiana 70112
Telephone: (504) 525-7703

Counsel for Petitioner
**Attorney of Record for Petitioner*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED FOR REVIEW

1. Whether the opinion of the Fifth Circuit Court of Appeals in *Arkoma Associates v. C. Tom Carden, et al.*, ___ F. 2d ___, rehearing denied, August 2, 1990, is in conflict with this Court's decision in *United States Upon the Relation and for the Use and Benefit of Texas Portland Cement Company, et al. v. McCord*, 233 U. S. 157 (S. Ct. 1914).

2. Whether a Federal Court may maintain jurisdiction of an intervention in a case in which the original claim was dismissed for lack of diversity jurisdiction by treating the intervention as an independent action.

3. Whether a Federal Court may treat an intervention as an independent action in the absence of service of process thereon as required by *Rule 4* of the *Federal Rules of Civil Procedure.*

4. Whether the Court of Appeals may properly treat an intervention as an independent action in a case dismissed for lack of diversity jurisdiction of the original claim when the District Court did not exercise its discretion to treat the intervention as an independent action, but tried the intervention as an ancillary matter in the original civil action in the erroneous belief that it possessed diversity jurisdiction to hear the original civil action.

STATEMENT OF PARTIES

Pursuant to Rule 14.1 (b) counsel for petitioner certifies that the following named persons are parties to the proceeding in the Court of Appeals for the Fifth Circuit review of whose judgment petitioner seeks:

(1) C. T. Carden;
(2) Leonard L. Limes;
(3) Magee Drilling Company;
(4) Arkoma Associates;
(5) David A. Hepburn;
(6) Eldon Qualls;
(7) Richard K. Ledbetter;
(8) Dudley B. Merkel;
(9) Henry Stram;
(10) Lloyd Canton;
(11) Marie Weaver;
(12) Richard Aylward;
(13) Robert Aylward;
(14) Larry Berberich;
(15) Abhay Bisarya;
(16) Joseph Bowman;
(17) Harvie Chaddock;
(18) Dr. James Di Renna;
(19) Dr. John Hagan;
(20) Leo Hallack;
(21) Robert E. Harmon;
(22) Richard L. Harmon;
(23) Earl Hoatson;
(24) Andrew Kaufman;
(25) Dr. Allen Parelman;
(26) Bill Kryger;
(27) L V A Partnership;
(28) Dr. Richard Lynch;
(29) McFadin Partnership;
(30) John Mc Keever;
(31) Percy Mc Kinley;
(32) Nat N. Nast;
(33) Dr. John Pawsat;
(34) Henry Rankin;

STATEMENT OF PARTIES – Continued

(35) David Russell;

(36) Robert Samson;

(37) Dr. Daniel Scharf;

(38) Robert Schneider;

(39) Robert Eltonhead;

(40) Dennis Swan;

(41) Dick Gibson;

(42) Larry Shultz;

(43) Keith Shultz;

(44) Elton Shannon;

(45) Ernest Staub;

(46) Frances Swan;

(47) John Sullivan;

(48) John Symon;

(49) David Wharton;

(50) Dale Williams;

(51) Dr. Robert Doering; and

(52) Jim Veselich.

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES

CONSTITUTIONAL PROVISION

STATUTES

TABLE OF OPINIONS DELIVERED IN CASE

No. _____

In The

Supreme Court of the United States

October Term, 1990

MAGEE DRILLING COMPANY,

Petitioner,

versus

ARKOMA ASSOCIATES, ET AL.

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES

Petitioner, Magee Drilling Company, prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Fifth Circuit in this cause.

DECISION TO BE REVIEWED

Petitioner seeks review of the opinion of the United States Court of Appeals for the Fifth Circuit rendered in

Arkoma Associates v. C. T. Carden, et al. Nos. 87-3624, and 87-3917, June 26, 1990.

The decision is set forth in the Appendices.

OTHER DECISIONS RENDERED IN THE CASE

The following decisions were rendered in this case prior to that review of which is sought, to wit:

(1) *Carden, et al. v. Arkoma Associates,* 494 U. S. ___, 110 S. Ct. 1015, 108 L. Ed. 2d 157 (S. Ct. 1990);

(2) *Arkoma Associates v. C. T. Carden, et al.,* 874 F. 2d 226 (5th Cir. 1989); and

(3) *Arkoma Associates v. C. T. Carden, et al.,* No. 86-9201 (5th Cir. 1986)

These opinions are set forth in the Appendices.

GROUNDS FOR JURISDICTION

The opinion of the Court of Appeals for the Fifth Circuit in this case was rendered on June 26, 1990, and rehearing was denied on July 23, 1990. This petition for a writ of certiorari was filed within ninety days of the date of entry of the Court of Appeals' opinion.

Jurisdiction of this Court is predicated upon *28 U. S. C. 1254(1).*

CONSTITUTIONAL AND STATUTORY PROVISIONS

The questions presented by this petition involve the following constitutional and statutory provisions of the United States:

> *United States Constitution, Article III Section 2* provides:
>
> The judicial Power shall extend to all Cases in Law and Equity . . . between citizens of different States. . . .
>
> *28 U. S. C. 1332(a)* provides:
>
> The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum of $50,000.00, exclusive of interest and costs, and is between –
>
> (1) citizens of different States; . . .

STATEMENT OF THE CASE

Respondent, Arkoma Associates, a purported Arizona limited partnership (hereafter "Arkoma"), invoking the diversity jurisdiction of the District Court, filed this suit against C. T. Carden and Leonard L. Limes (hereafter "Carden/Limes") as the guarantors of the performance of petitioner, Magee Drilling Company, a Texas corporation (hereafter "Magee") and lessee of an equipment lease entered into with Arkoma as lessor. In that one of Arkoma's purported limited partners was a citizen of Louisiana as were Carden/Limes, a motion to dismiss for lack of diversity jurisdiction was filed. The District Court denied the motion to dismiss, but certified the issue to the Court of Appeals for the Fifth Circuit (hereafter

"Court of Appeals") for interlocutory appeal. The Court of Appeals declined to consider the interlocutory appeal. Magee then, by motion, intervened as a defendant and filed a counterclaim asserting a cause of action pursuant to the *Texas Deceptive Trade Practices/Consumer Protection Act* (hereafter "DTPA"). Service of the intervention in accordance with *Rule 4* of the *Federal Rules of Civil Procedure* was not effected. Rather, the intervention was effected by motion with notice to Arkoma by mail.

The case was tried on the merits before the District Court sitting without a jury, and resulted in a judgment against Carden/Limes in favor of Arkoma. Carden/Limes's counterclaim, and Magee's DTPA claim were dismissed. The Court of Appeals, finding diversity jurisdiction existed on the basis of the citizenship of Carden/Limes and Arkoma, affirmed the judgment of the District Court (874 F. 2d 226). Carden/Limes and Magee's application for certiorari to the Supreme Court was granted, and resulted in the dismissal of Arkoma's claim against Carden/Limes for lack of diversity jurisdiction because of the identity of citizenship existing among Carden/Limes and a limited partner of Arkoma. Magee's DTPA claim was remanded to the Court of Appeals for consideration of jurisdiction to hear such claim. This Court's opinion appears in the Appendix at page A-1.

On June 26, 1990, the Court of Appeals rendered judgment finding that diversity jurisdiction existed insofar as Magee's intervention was concerned in that Magee was a Texas citizen and no member of Arkoma possessed Texas citizenship. The Court of Appeals affirmed the District Court's dismissal of Magee's DTPA claim.

Rehearing was denied by the Court of Appeals on July 23, 1990, and this application for certiorari followed.

REASONS FOR GRANTING THE WRIT

1. The decision of the Court of Appeals is in conflict with the decision of this Court in *United States Upon the Relation and for the Use and Benefit of Texas Portland Cement Company, et al. v. McCord*, 233 U. S. 157, 34 S. Ct. 550, 58 L. Ed. 893 (S. Ct. 1914).

2. The decision of the Court of Appeals is in conflict with its decision in *Kendrick v. Kendrick*, 16 F. 2d 744 (5th Cir. 1927) which established a consistent line of jurisprudence unbroken until the decision rendered in this case. See *Truvillion v. King's Daughter's Hospital*, 614 F. 2d 530 (5th Cir. 1980); *Non Commissioned Officers Association of the United States of America, et al. v. Army Times Publishing Company*, 637 F. 2d 372 (5th Cir. 1981); and *Harris v. Amoco Production Co.*, 768 F. 2d 669 (5th Cir. 1985).

ARGUMENT

MAY IT PLEASE THE COURT:

Magee's intervention was not a continuation of this case by Magee after dismissal or settlement of the original principal action over which the District Court had jurisdiction, as occurred in the case relied on by the Court of Appeals, *Hunt Tool Co. v. Moore, Inc.*, 212 F. 2d 685 (5th Cir. 1954). Rather, this case was tried on the merits after

the Court of Appeals erroneously found, when it refused to hear Carden/Limes's interlocutory appeal, that diversity of citizenship existed among Carden/Limes and Arkoma. Magee's intervention was tried as an ancillary matter appended to the main demand. Therefore, the fate of the intervention must abide the disposition of the main demand. Such was the holding of this Court in *United States upon the Relation and for the Use and Benefit of Texas Portland Cement Company v. McCord*, supra, to wit:

> These rights to intervene and to file a claim, conferred by the statute, presupposes an action duly brought under its terms. . . .
>
> Nor do we think that the intervention could be treated as an original suit. No service was made or attempted to be had upon it as required by the statute when original actions are begun by creditors. As we read the certificate, the intervention was what it purported to be – an appearance in the original suit, already brought, and in our view must abide the fate of that suit.

Jurisdiction based on alleged diverse citizenship among Arkoma and Carden/Limes was the only jurisdiction invoked in the District Court. This was not a case in which the trial Judge exercised discretion to try the intervention as a separate suit after settlement or dismissal of the original action Rather, the intervention was allowed and tried *after* the Court of Appeals found jurisdiction where none existed. Had the Court of Appeals held otherwise when the matter was before it on interlocutory appeal, and had the District Court then sought to hear the intervention independently, there would have been before the Court of Appeals the issue of the propriety of

the exercise of discretion by the District Court. In the context of these proceedings, however, the District Court never turned its mind to independently hearing the intervention nor had it ever the opportunity to do so in light of the finding of diversity jurisdiction by the Court of Appeals. -

The Court of Appeals has recognized the principle of *McCord* in a line of cases dating back to 1927, unbroken save for the decision review of which is the subject of this application for certiorari. In *Kendrick v. Kendrick,* 16 F. 2d 744 (5th Cir. 1927) the Court of Appeals held that:

> An existing suit within the court's jurisdiction is a prerequisite of an intervention, which is an ancillary proceeding in an already instituted suit or action by which a third party is permitted to make himself a party. . . .

The *Kendrick* decision has been followed by the Court of Appeals in *Truvillion v. King's Daughter's Hospital,* 614 F. 2d 530 (5th Cir. 1980); *Non Commissioned Officers Association of the United States of America, et al. v. Army Times Publishing Company,* 637 F. 2d 372 (5th Cir. 1981); and *Harris v. Amoco Production Co.,* 768 F. 2d 669 (5th Cir. 1985). In *Truvillion,* the Court of Appeals held that:

> A different case is presented, however, when the earlier suit brought by the E. E. O. C. was jurisdictionally or procedurally defective. There is no right and no obligation to intervene in a defective suit. As we said in 1926,'[a]n existing suit is a prerequisite of an intervention, which is an ancillary proceeding in an already instituted suit' . . . Whether the right to intervene is permissive or unqualified cannot affect the application of this rule.

Alternatively, in that service of Magee's intervention in accordance with *Rule 4* of the *Federal Rules of Civil Procedure* was not made, the District Court was precluded from treating the intervention as an original suit as this Court held in *McCord*, supra.

CONCLUSION

The decision of the Court of Appeals in this case conflicts with that of this Court in *United States Upon the Relation and for the Use and Benefit of Texas Portland Cement Company, et al. v. McCord*, supra. Petitioners therefore pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

RICHARD K. INGOLIA*
KENNETH J. BERKE

BERKE & INGOLIA
A Professional Law Corporation
200 Oil & Gas Building
1100 Tulane Avenue
New Orleans, Louisiana 70112
Telephone: (504) 525-7703

Counsel for Petitioner
**Attorney of Record for Petitioner*

APPENDIX A

SUPREME COURT OF THE UNITED STATES

No. 88-1476

C.T. CARDEN, ET AL., PETITIONERS *v.*
ARKOMA ASSOCIATES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

[February 27, 1990]

JUSTICE SCALIA delivered the opinion of the Court.

The question presented in this case is whether, in a suit brought by a limited partnership, the citizenship of the limited partners must be taken into account to determine diversity of citizenship among the parties.

I

Respondent Arkoma Associates (Arkoma), a limited partnership organized under the laws of Arizona, brought suit on a contract dispute in the United States District Court for the Eastern District of Louisiana, relying upon diversity of citizenship for federal jurisdiction. The defendants, C. Tom Carden and Leonard L. Limes, citizens of Louisiana, moved to dismiss, contending that one of Arkoma's limited partners was also a citizen of Louisiana. The District Court denied the motion but certified the question for interlocutory appeal, which the Fifth Circuit declined. Thereafter Magee Drilling Company

intervened in the suit and, together with the original defendants, counterclaimed against Arkoma under Texas law. Following a bench trial, the District Court awarded Arkoma a money judgment plus interest and attorney's fees; it dismissed Carden and Limes' counterclaim and as well as Magee's intervention and counterclaim. Carden, Limes, and Magee (petitioners here) appealed and the Fifth Circuit affirmed. 874 F.2d 226 (1988). With respect to petitioners' jurisdictional challenge, the Court of Appeals found complete diversity, reasoning that Arkoma's citizenship should be determined by reference to the citizenship of the general, but not the limited, partners. We granted certiorari. 490 U.S. ___ (1989).

II.

Article III of the Constitution provides, in pertinent part, that "The judicial Power shall extend to . . . Controversies . . . between Citizens of different States." Congress first authorized the federal courts to exercise diversity jurisdiction in the Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 78. In its current form, the diversity statute provides that "[t]he district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds . . . $50,000 . . . , and is between . . . citizens of different States . . . . " 28 U.S.C.A. § 1332(a) (Oct. 1989 Supp.). Since its enactment, we have interpreted the diversity statute to require "complete diversity" of citizenship. See *Strawbridge v. Curtiss*, 3 Cranch 267 (1806). The District Court erred in finding complete diversity in this case unless (1) a limited partnership may be considered in its own right a "citizen" of the State that created it, or (2) a federal court must look to the citizenship of

only its general, but not its limited, partners to determine whether there is complete diversity of citizenship. We consider these questions in turn.

A

We have often had to consider the status of artificial entities created by state law insofar as that bears upon the existence of federal diversity jurisdiction. The precise question posed under the terms of the diversity statute is whether such an entity may be considered a "citizen" of the State under whose laws it was created.[1] A corporation

---

[1] The dissent reaches a conclusion different from ours primarily because it poses, and then answers, an entirely different question. It "do[es] not consider" "whether the limited partnership is a 'citizen,' " but simply "assum[es] it is a citizen," because even if we hold that it is, "we are still required to consider which, if any, of the *other citizens before the Court* as members of Arkoma Associates are real parties to the controversy." *Post*, at 1 (emphasis added). Furthermore, "[t]he only potentially nondiverse *party* in this case is a limited partner" because [a]ll *other parties*, including the general partners and the limited partnership itself, assuming it is a citizen, are diverse." *Ibid.* (emphasis added).

That is the central fallacy from which, for the most part, the rest of the dissent's reasoning logically follows. The question presented today is not which of various parties before the Court should be considered for purposes of determining whether there is complete diversity of citizenship, a question that will generally be answered by application of the "real party to the controversy" test. There are *not*, as the dissent assumes, multiple respondents before the Court, but only *one*: the artificial entity called Arkoma Associates, a limited partnership. And what we must decide is the quite different question of how the citizenship of that single artificial entity is to be

(Continued on following page)

is the paradigmatic artificial "person," and the Court has considered its proper characterization under the diversity statute on more than one occasion – not always reaching the same conclusion. Initially, we held that a corporation "is certainly not a citizen," so that to determine the existence of diversity jurisdiction the Court must "look to the character of the individuals who compose [it]." *Bank of United States v. Deveaux*, 5 Cranch 61, 86, 91-92 (1809). We overruled *Deveaux* 35 years later in *Louisville, C. & C. R. Co. v. Letson*, 2 How. 497, 558 (1844), which held that a corporation is "capable of being treated as a citizen of [the State which created it], as much as a natural person." Ten years later, we reaffirmed the result of *Letson*, though on the somewhat different theory that "those who use the corporate name, and exercise the faculties conferred by it," should be presumed conclusively to be citizens of the corporation's State of incorporation. *Marshall v. Baltimore & Ohio R. Co.*, 16 How. 314, 329 (1854).

While the rule regarding the treatment of corporations as "citizens" has become firmly established, we have (with an exception to be discussed presently) just as firmly resisted extending that treatment to other entities. For example, in *Chapman v. Barney*, 129 U.S. 677 (1889), a case involving an unincorporated "joint stock company,"

(Continued from previous page)

determined – which in turn raises the question whether it can (like a corporation) assert its own citizenship, or rather is deemed to possess the citizenship of its members, and, if so, which members. The dissent fails to cite a single case in which the citizenship of an artificial entity, the issue before us today, has been decided by application of the "real party to the controversy" test that it describes. See *infra*, at 7-10.

we raised the question of jurisdiction on our own motion, and found it to be lacking:

> "On looking into the record we find no satisfactory showing as to the citizenship of the plaintiff. The allegation of the amended petition is, that the United States Express Company is a joint stock company organized under a law of the State of New York, and is a citizen of that State. But the express company cannot be a *citizen* of New York, within the meaning of the statutes regulating jurisdiction, unless it be a corporation. The allegation that the company was *organized* under the laws of New York is not an allegation that it is a corporation. In fact the allegation is, that the company is *not* a corporation, but a joint stock company – that is, a mere partnership." *Id.* at 682.

Similarly, in *Great Southern Fire Proof Hotel Co. v. Jones*, 177 U.S. 449 (1900), we held that a "limited partnership association" – although possessing "some of the characteristics of a corporation" and deemed a "citizen" by the law creating it – may not be deemed a "citizen" under the jurisdictional rule established for corporations. *Id.*, at 456. "That rule must not be extended." *Id.*, at 457. As recently as 1965, our unanimous opinion in *Steelworkers v. R.H. Bouligny, Inc.*, 382 U.S. 145, reiterated that "the doctrinal wall of *Chapman v. Barney*," *id.*, at 151, would not be breached.

The one exception to the admirable consistency of our jurisprudence on this matter is *Puerto Rico v. Russell & Co.*, 288 U.S. 476 (1933), which held that the entity known as a *sociedad en comandita*, created under the civil law of Puerto Rico, could be treated as a citizen of Puerto Rico for purposes of determining federal court jurisdiction.

The *sociedad*'s juridical personality, we said, "is so complete in contemplation of the law of Puerto Rico that we see no adequate reason for holding that the *sociedad* has a different status for purposes of federal jurisdiction than a corporation organized under that law." *Id.*, at 482. Arkoma fairly argues that this language, and the outcome of the case, "reflec[t] the Supreme Court's willingness to look beyond the incorporated/unincorporated dichotomy and to study the internal organization, state law requirements, management structure, and capacity or lack thereof to act and/or sue, to determine diversity of citizenship." Brief for Respondent 14. The problem with this argument lies not in its logic, but in the fact that the approach it espouses was proposed and specifically rejected in *Bouligny*. There, in reaffirming "the doctrinal wall of *Chapman v. Barney*," we explained *Russell* as a case resolving the distinctive problem "of fitting an exotic creation of the civil law . . . into a federal scheme which knew it not." 382 U.S., at 151. There could be no doubt, after *Bouligny*, that at least common-law entities (and likely all entities beyond the Puerto Rican *sociedad en comandita*) would be treated for purposes of the diversity statute pursuant to what *Russell* called "[t]he tradition of the common law," which is "to treat as legal persons only incorporated groups and to assimilate all others to partnerships." 288 U.S., at 480.[2]

---

[2] The dissent correctly observes that "*Russell* tells us nothing about whether the citizenship of the *sociedad*'s members, unlimited or limited, should be considered for purposes of diversity jurisdiction." *Post*, at 11. Rather, as is evident from our discussing the case here instead of in Part B below, *Russell*

(Continued on following page)

Arkoma claims to have found another exception to our *Chapman* tradition in *Navarro Savings Assn. v. Lee*, 446 U.S. 458 (1980). That case, however, did not involve the question whether a party that is an artificial entity other than a corporation can be considered a "citizen" of a State, but the quite separate question whether parties that were undoubted "citizens" (viz., natural persons) were the real parties to the controversy. The plaintiffs in *Navarro* were eight individual trustees of a Massachusetts business trust, suing in their own names. The defendant, Navarro Savings, Association, disputed the existence of complete diversity, claiming that the trust beneficiaries

---

(Continued from previous page)

(according to respondent) tells us something about whether an artificial entity other than a corporation can be considered a "citizen" in its own right. That "[t]he issue in *Russell* was not diversity, but whether the suit against the *sociedad en comandita* could be removed from the Insular Court to the United States District Court for Puerto Rico," *post*, at 10, does not affect *Russell*'s arguable relevance to that question because the operative word in both the diversity statute and the removal statute at issue in *Russell* is "citizens."

The dissent goes on to criticize as "seriously flawed," *post*, at 11, our attempt to distinguish *Russell* in connection with the issue we do address, whether a partnership can be considered a "citizen." We point out, not by way of complaint but to prevent confusion, that the criticism is gratuitous, inasmuch as the dissent itself takes no position on this issue, announcing at the very outset that it "do[es] not consider" the question "whether the limited partnership is a 'citizen.' " *Post*, at 1. In any event, the dissent's evidence bearing on the historical pedigree of partnership comes to our attention at least 25 years too late. For the reasons stated in the text, *Bouligny* considered and rejected applying *Russell* beyond its facts.

rather than the trustees were the real parties to the controversy, and that the citizenship of the former and not the latter should therefore control. In the course of rejecting this claim, we did indeed discuss the characteristics of a Massachusetts business trust – not at all, however, for the purpose of determining whether the trust had attributes making it a "citizen," but only for the purpose of establishing that the respondents were "active trustees whose control over the assets held in their names is real and substantial," thereby bringing them under the rule, "more than 150 years" old, which permits such trustees "to sue in their own right, without regard to the citizenship of the trust beneficiaries." *Id.*, at 465-466. *Navarro*, in short, has nothing to do with the *Chapman* question, except that it makes available to respondent the argument by analogy that, just as business reality is taken into account for purposes of determining whether a trustee is the real party to the controversy, so also it should be taken into account for purposes of determining whether an artificial entity is a citizen. That argument is, to put it mildly, less than compelling.

B

As an alternative ground for finding complete diversity, Arkoma asserts that the Fifth Circuit correctly determined its citizenship solely by reference to the citizenship of its general partners, without regard to the citizenship of its limited partners. Only the general partners, it points out, "manage the assets, control the litigation, and bear the risk of liability for the limited partnership's debts," and, more broadly, "have exclusive and complete

management and control of the operations of the partnership." Brief for Respondent 30, 36. This approach of looking to the citizenship of only some of the members of the artificial entity finds even less support in our precedent than looking to the State of organization (for which one could at least point to *Russell*). We have never held that an artificial entity, suing or being sued in its own name, can invoke the diversity jurisdiction of the federal courts based on the citizenship of some but not all of its members. No doubt some members of the joint stock company in *Chapman*, the labor union in *Bouligny*, and the limited partnership association in *Great Southern* exercised greater control over their respective entities than other members. But such considerations have played no part in our decisions.

To support its approach, Arkoma seeks to press *Navarro* into service once again, arguing that just as that case looked to the trustees to determine the citizenship of the business trust, so also here we should look to the general partners, who have the management powers, in determining the citizenship of this partnership. As we have already explained, however, *Navarro* had nothing to do with the citizenship of the "trust," since it was a suit by the trustees in their own names.

The dissent supports Arkoma's argument on this point, though, as we have described, under the rubric of determining which parties supposedly before the Court are the real parties, rather than under the rubric of determining the citizenship of the limited partnership. See n. 1, *supra*. The dissent asserts that "[t]he real party to the controversy approach," *post*, at 4 – by which it means an approach that looks to "control over the conduct of the

business and the ability to initiate or control the course of litigation," *post*, at 7 – "has been implemented by the Court both in its oldest and in its most recent cases examining diversity jurisdiction with respect to business associations." *Post*, at 4. Not a single case the dissent discusses, neither old nor new, supports that assertion. *Deveaux*, which was in any event overruled by *Letson*, seems to be applying not a "real party to the controversy" test, but rather the principle that for jurisdictional purposes the corporation has no substance, and merely "represents" its shareholders, see 5 Cranch, at 90-91; but even if it can be regarded as applying a "real party to the controversy" test, it deems that test to be met by *all* the shareholders of the corporation, without regard to their "control over the operation of the business." *Marshall*, which as we have discussed re-rationalized *Letson's* holding that a corporation was a "citizen" in its own right, contains language quite clearly adopting a "real party to the controversy" approach, and arguably even adopting a "control" test for that status. "[T]he court . . . will look behind the corporate or collective name . . . to find the persons who act *as the representatives, curators, or trustees*. . . . " 16 How., at 328-329 (emphasis added). "The presumption arising from the habitat of a corporation in the place of its creation [is] conclusive as to the residence or citizenship *of those who use the corporate name and exercise the faculties conferred by it*. . . . " *Id.* at 329 (emphasis added).) But as we have also discussed, and as the last quotation shows, that analysis was a complete fiction; the real citizenship of the shareholders (or the

controlling shareholders) was not consulted at all.[3] From the fictional *Marshall*, the dissent must leap almost a century and a third to *Navarro* to find a "real party to the controversy" analysis that discusses "control." That case, as we have said, is irrelevant, since it involved not a juridical person but the distinctive common-law institution of trustees.

The dissent finds its position supported, rather than contradicted, by the trilogy of *Chapman*, *Great Southern*, and *Bouligny* – cases that did involve juridical persons but that did not apply "real party to the controversy" analysis, much less a "control" test as the criterion for that status. In those cases, the dissent explains, "the members of each association held equivalent power and control over the associations' assets, business, and litigation." *Post*, at 5. It seeks to establish this factual matter, however, not from the text of the opinions (where not the slightest discussion of the point appears) but, for *Chapman*, by citation of scholarly commentary dealing with the general characteristics of joint stock company agreements, with no reference to (because the record does not contain) the particular agreement at issue in the case,

---

[3] *Marshall's* fictional approach appears to have been abandoned. Later cases revert to the formulation of *Louisville, C. & C. R. Co. v. Letson*, 2 How. 497 (1844), that the corporation has its own citizenship. See *Great Southern Fire Proof Hotel v. Jones*, 177 U.S. 449, 456 (1900) ("for purposes of jurisdiction . . . a corporation was to be deemed a citizen of the State creating it") (citing *Letson*); *Chapman v. Barney*, 129 U.S. 677, 682 (1889) ("express company cannot be a *citizen* of New York, within the meaning of statutes regulating jurisdiction, unless it be a corporation").

post, at 5-6; for *Great Southern*, by citation of scholarly commentary dealing with general characteristics of Pennsylvania limited partnership associations, and citation of Pennsylvania statutes, *post*, at 6-7; and, for *Bouligny*, by nothing more than the observation that "[t]here was no indication that any of the union members had any greater power over the litigation or the union's business and assets than any other member, and, therefore, as in *Chapman* and *Great Southern*, the Court was not called upon to decide" the issue, *post*, at 7. This will not do. Since diversity of citizenship is a jurisdictional requirement, the Court is always "called upon to decide" it. As the Court said in *Great Southern* itself:

> "[T]he failure of parties to urge objections [to diversity of citizenship] cannot relieve this court from the duty of ascertaining from the record whether the Circuit Court could properly take jurisdiction of this suit. . . . 'The rule . . . is inflexible and without exception, which requires this court, of its own motion, to deny its own jurisdiction, and, in the exercise of its appellate power, that of all other courts of the United States, in all cases where such jurisdiction does not affirmatively appear in the record on which, in the exercise of that power, it is called to act.' " 177 U.S., at 453 (quoting *Mansfield, C. & L. M. R. Co. v. Swan*, 111 U.S. 379, 382 (1884)).

If, as the dissent contends, these three cases were applying a "real party to the controversy" test governed by "control" over the associations, so that the citizenship of all members would be consulted only if all members had equivalent control, it is inconceivable that the existence of equivalency, *or at least the absence of any reason to suspect nonequivalency*, would not have been mentioned in the

opinions. Given what 180 years of cases have said and done, as opposed to what they might have said, it is difficult to understand how the dissent can characterize as "newly formulated" the "rule that the Court will, without analysis of the particular entity before it, count every member of an unincorporated association for purpose of diversity jurisdiction." *Post*, at 2.

In sum, we reject the contention that to determine, for diversity purposes, the citizenship of an artificial entity, the court may consult the citizenship of less than all of the entity's members. We adhere to our oft-repeated rule that diversity jurisdiction in a suit by or against the entity depends on the citizenship of "all the members," *Chapman*, 129 U.S. at 682, "the several persons composing such association," *Great Southern*, 177 U.S., at 456, "each of its members," *Bouligny*, 382 U.S., at 146.

C

The resolutions we have reached above can validly be characterized as technical, precedent-bound, and unresponsive to policy considerations raised by the changing realities of business organization. But, as must be evident from our earlier discussion, that has been the character of our jurisprudence in this field after *Letson*. See Currie, The Federal Courts and the American Law Institute, 36 U. Chi. L. Rev. 1, 35 (1968). Arkoma is undoubtedly correct that limited partnerships are functionally similar to "other types of organizations that have access to federal courts," and is perhaps correct that "[c]onsiderations of basic fairness and substance over form require that limited partnerships receive similar treatment." Brief for

Respondent 33. Similar arguments were made in *Bouligny*. The District Court there had upheld removal because it could divine " 'no common sense reason for treating an unincorporated national labor union differently from a corporation,' " 382 U.S., at 146, and we recognized that that contention had "considerable merit," *id.*, at 150. We concluded, however, that "[w]hether unincorporated labor unions ought to assimilated to the state of corporations for diversity purposes," *id.*, at 153, is "properly a matter for legislative consideration which cannot adequately or appropriately be dealt with by this Court," *id.*, at 147. In other words, having entered the field of diversity policy with regard to artificial entities once (and forcefully) in *Letson*, we have left further adjustments to be made by Congress.

Congress has not been idle. In 1958 it revised the rule established in *Letson*, providing that a corporation shall be deemed a citizen not only of its State of incorporation but also "of the State where it has its principal place of business." 28 U. S. C. A. § 1332(c) (Oct. 1989 Supp.) No provision was made for the treatment of artificial entities other than corporations, although the existence of many new, post-*Letson* forms of commercial enterprises, including at least the sort of joint stock company at issue in *Chapman*, the sort of limited partnership association at issue in *Great Southern*, and the the [sic] sort of Massachusetts business trust at issue in *Navarro*, must have been obvious.

Thus, the course we take today does not so much disregard the policy of accommodating our diversity

jurisdiction to the changing realities of commercial organization, as it honors the more important policy of leaving that to the people's elected representatives. Such accommodation is not only performed more legitimately by Congress than by courts, but it is performed more intelligently by legislation than by interpretation of the statutory word "citizen." The fifty States have created, and will continue to create, a wide assortment of artificial entities possessing different powers and characteristics, and composed of various classes of members with varying degrees of interest and control. Which of them is entitled to be considered a "citizen" for diversity purposes, and which of their members' citizenship is to be consulted, are questions more readily resolved by legislative prescription than by legal reasoning, and questions whose complexity is particularly unwelcome at the threshold stage of determining whether a court has jurisdiction. We have long since decided that, having established special treatment for corporations, we will leave the rest to Congress; we adhere to that decision.

III

Arkoma argues that even if this Court finds complete diversity lacking with respect to Carden and Limes, we should nonetheless affirm the judgment with respect to Magee because complete diversity indisputably exists between Magee and Arkoma. This question was not considered by the Court of Appeals. We decline to decide it in the first instance, and leave it to be resolved by the Court of Appeals on remand.

Reversed and remanded.

SUPREME COURT OF THE UNITED STATES

No. 88-1476

C. T. CARDEN, ET AL., PETITIONERS *v.*
ARKOMA ASSOCIATES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

[February 27, 1990]

JUSTICE O'CONNOR, with whom JUSTICE BRENNAN, JUSTICE MARSHALL, and JUSTICE BLACKMUN join, dissenting.

The only potentially nondiverse party in this case is a limited partner. All other parties, including the general partners and the limited partnership itself, assuming it is a citizen, are diverse. Thus, the Court has before it a single question – whether the citizenship of a limited partner must be counted for purposes of diversity jurisdiction. The Court first addresses whether the limited partnership is a "citizen." I do not consider that issue, because even if we were to hold that a limited partnership is a citizen, we are still required to consider which, if any, of the other citizens before the Court as members of Arkoma Associates are real parties to the controversy, *i.e.*, which parties have control over the subject of and litigation over the controversy. See *Marshall v. Baltimore & Ohio R. Co.*, 16 How. 314, 328 (1854). Application of that test leads me to conclude that limited partners are not real parties to the controversy and, therefore, should not be counted for purposes of diversity jurisdiction.

I

The Court asserts that "[w]e have long since decided" to leave to Congress the issue of the proper treatment of unincorporated associations for diversity purposes, because the issue of which business association "is entitled to be considered a 'citizen' for diversity purposes, and which of their members' citizenship is to be consulted, are questions more readily resolved by legislative prescription than by legal reasoning." *Ante*, at 12. That assertion is insupportable in light of *Navarro Savings Assn. v. Lee*, 446 U. S. 458 (1980) (determination of which members of unincorporated business trust must be considered for purposes of diversity jurisdiction) and even *Steelworkers v. R. H. Bouligny, Inc.*, 382 U. S. 145 (1965) (determination of proper treatment of union for diversity jurisdiction purposes according to settled law; Congress has power to change result), on which the court relies. *Ante*, at 11. Indeed, the Court in this case does not leave the issue to Congress, but rather decides the issue and then invokes deference to Congress to justify its newly formulated rule that the Court will, without analysis of the particular entity before it, count every member of an unincorporated association for purposes of diversity jurisdiction. In my view, the Court properly tackles the issue, because "application of statutes to situations not anticipated by the legislature is a pre-eminently judicial function." Currie, Federal Courts and the American Law Institute, 36 U. Chi. L. Rev. 1, 35 (1968); see also *Bank of United States v. Deveaux*, 5 Cranch 61, 87 (1809) ("The duties of this [C]ourt, to exercise jurisdiction where it is conferred, and not to usurp it where it is not conferred, are of equal obligation. The constitution, therefore, and

the law, are to be expounded, without a leaning the one way or the other, according to those general principles which usually govern in the construction of fundamental or other laws").

II

The starting point for any analysis of who must be counted for purposes of diversity jurisdiction is *Strawbridge v. Curtiss*, 3 Cranch 267 (1806), in which the Court held that "complete diversity" is required among "citizens" of different States. Complete diversity, however, is not constitutionally mandated. See *State Farm Fire & Casualty Co. v. Tashire*, 386 U. S. 523, 530-531 (1967) (statutory interpleader need not satisfy complete diversity requirement as long as there is diversity between two or more claimants); see also American Law Institute, Study of the Division of Jurisdiction Between State and Federal Courts § 1301(b)(2), supporting Memorandum A, pp. 426-436 (1969). For example, in a class action authorized pursuant to Federal Rule of Civil Procedure 23, only the citizenship of the named representatives of the class is considered, without regard to whether the citizenship of other members of the class would destroy complete diversity or to the class members' particular stake in the controversy. See *Snyder v. Harris*, 394 U. S. 332, 340 (1969); C. Wright, Law of Federal Courts 314-315 (2d ed. 1970); see also *Owen Equipment & Erection Co. v. Kroger*, 437 U. S. 365, 375, and n. 18 (1978) (citizenship of parties joined under ancillary jurisdiction not taken into account for purposes of determining diversity jurisdiction); Wright, *supra*, at 19 (same).

Since the early 19th century, one of the benchmarks for determining whether a particular party among those involved in the litigation must be counted for purposes of diversity jurisdiction has been whether the party has a "real interest" in the suit or, in other words, is a "real party" to the controversy. See 6 C. Wright & A. Miller, Federal Practice and Procedure § 1556, p. 711 (1971) (well settled "citizenship rule testing diversity in terms of the real party in interest is grounded in notions of federalism"). See generally Note, Diversity Jurisdiction over Unincorporated Business Entities: The Real Party in Interest as a Jurisdictional Rule, 56 Texas L. Rev. 243, 247-250 (1978). In *Wormley v. Wormley*, 8 Wheat. 421 (1823), for example, the Court stated:

> "This Court will not suffer its jurisdiction to be ousted by the mere joinder or non-joinder of formal parties; but will rather proceed without them, and decide upon the merits of the case between the parties, who have the real interests before it, whenever it can be done without prejudice to the rights of others." *Id.* at 451 (footnote omitted).

See also *Wood v. Davis*, 18 How. 467, 469 (1856) ("It has been repeatedly decided by this [C]ourt, that formal parties, or nominal parties, or parties without interest, united with the real parties to the litigation, cannot oust the federal courts of jurisdiction . . . ").

The real party to the controversy approach has been implemented by the Court both in its oldest and in its most recent cases examining diversity jurisdiction with respect to business associations. In the Court's first examination of the corporate form to determine who must be counted for purposes of diversity jurisdiction, the Court

invoked the real party to the controversy test and concluded that the citizenship of each shareholder must be counted for purposes of diversity jurisdiction. *Bank of United States v. Deveaux*, 5 Cranch, at 91-92. In *Deveaux*, the Court recognized that corporations had been considered as possessing "corporeal qualities." *id.*, at 89, but concluded that the actual parties to the controversy were "the members of the corporation . . . who come into court, in this case, under their corporate name." *Id.*, at 91. By 1854, the Court no longer characterized the corporation as merely possessing "corporeal qualities," but rather as a "juridical person," which made an even stronger case for recognizing a corporation as a proper party in its own right before the Court. See *Marshall v. Baltimore & Ohio R. Co.*, 16 How., at 328; see also *Louisville, Cincinnati & Charleston R. Co. v. Letson*, 2 How. 497, 558-559 (1844) (corporation is a person; shareholders' citizenship will not be counted).

In *Marshall*, as in *Deveaux*, however, the determination whether the corporation was a citizen did not signal the end of the diversity jurisdiction inquiry. 16 How., at 328. Rather, the Court engaged in a two-part inquiry: (1) is the corporation a "juridical person" which can serve as a real party to the controversy, see *id.*, at 327-329; and (2) are the shareholders real parties to the controversy. See *id.*, at 328. To determine whether the corporation or the shareholders were real parties to the controversy, the Court considered which citizens held control over the business decisions and assets of the corporation and over the initiation and course of litigation involving the corporation. The corporation, as the representative body of the

shareholders, itself had such power. The shareholders did not.

> "[F]or all the purposes of acting, contracting, and judicial remedy, [shareholders] can speak, act, and plead, only through their representatives or curators. For the purposes of a suit or controversy, the persons represented by a corporate name can appear only by attorney, appointed by its constitutional organs. . . . [T]hey are not really parties to the suit or controversy." *Ibid.*

Having concluded that the shareholders were not the real parties to the controversy, the Court held that only the state of incorporation of the corporate entity need to be counted for purposes of diversity jurisdiction and that the citizenship of the shareholders would be presumed to be that of the state of incorporation. *Id.*, at 328-329. As the Court makes plain in *Marshall*, consideration of whether the shareholders were real parties to the controversy was a necessary prerequisite to the creation of the legal fiction that their citizenship would be deemed that of the corporation.

In a series of three cases considering the citizenship of business associations following *Marshall*, the Court was not called upon to determine which of the citizens before it were the real parties to the controversy because the business associations were not citizens themselves and the members of each association held equivalent power and control over the association's assets, business, and litigation. In *Chapman v. Barney*, 129 U. S. 677 (1889), the Court addressed the issue whether a joint stock company was a citizen for purposes of diversity jurisdiction. A joint stock company, now a historical anomaly, see A.

Bromberg, Crane and Bromberg on Partnership 178, and n. 16 (1968), had several features of the corporate form, *e.g.*, centralized management and transferability of shares, but was more like a general partnership in that each partner was personally liable and there was only one class of partners. See Comment, Limited Partnerships and Federal Diversity Jurisdiction, 45 U. Chi. L. Rev. 384, 389, and n. 32 (1978). Each "partner" had equal power over the conduct of the business by virtue of his power to elect and control the company's managers. Bromberg, *supra*, at 179, n. 19. The Court held that a joint stock company was a "mere partnership" and therefore not sufficiently similar to a corporation to justify designating it as a citizen. 129 U. S., at 682. Hence, the citizenship of each owner had to be counted for purposes of diversity jurisdiction. Because the joint stock company owners were similarly situated in terms of power and control over the company, possessed all of the power that could be exercised over the company's business and litigation, and the company itself was not a citizen, the Court was not called upon to determine which of the citizens before it were the real parties to the controversy.

The Court applied a similar approach in *Great Southern Fire Proof Hotel Co. v. Jones*, 177 U. S. 449 (1900), when it examined a limited partnership association. Quite unlike the modern limited partnership, the limited partnership association at issue in *Great Southern*, recognized by very few states, Comment, 45 U. Chi. L. Rev., *supra*, at 389, n. 36, was a species of business association involving a single class of partners with limited liability who exercised control over the operation of the business by annually electing the managers of the association. See, *e.g.*,

1874 Pa. Laws, Act. No. 153, §§ 2, 5; Comment, 45 U. Chi. L. Rev., *supra*, at 389, n. 36. Not surprisingly, the Court viewed such an organization as more like a partnership than a corporation. See F. Burdick, Law of Partnership 361-362 (1899) (limited partnership association like corporation in some respects, but generally treated by the courts as a general partnership). As in the case of the joint stock company, because all partners were similarly situated in terms of power and control over the company, there was no reason for the Court to inquire who, among the partners, were the real parties to the controversy.

In *Steelworkers v. R. H. Bouligny, Inc.*, 382 U. S. 145 (1965), the Court addressed whether a labor union could be treated as an entity for purposes of diversity jurisdiction. The Court held that a labor union is not a juridical person, and therefore, not a citizen for purposes of diversity jurisdiction. See *Mesa Operating Limited Partnership v. Louisiana Intrastate Gas Corp.*, 797 F.2d 238, 240-241 (CA5 1986) (union in *Bouligny* failed to meet party to controversy test). There was no indication that any of the union members had any greater power over the litigation or the union's business and assets than any other member, and, therefore, as in *Chapman* and *Great Southern*, the Court was not called upon to decide which of the citizens before it were real parties to the controversy.

In the next case, in which application of the real party to the controversy test was appropriate, the Court unanimously applied it. See *Navarro Savings Assn. v. Lee*, 446 U. S. at 460, 464-465; *id.*, at 469, 475 (BLACKMAN, J., dissenting). In that case, the Court addressed the question whether the beneficiaries' citizenship must be counted when the trustees brought suit involving the assets of

the trust. See *id.*, at 458. Because the trust beneficiaries lacked both control over the conduct of the business and the ability to initiate or control the course of litigation, the Court held that the citizenship of the trust beneficiaries should not be counted. *Id.*, at 464-465.

As *Navarro* makes clear, the nature of the named party does not settle the question of who are the real parties to the controversy. In fact, if the Court's characterization of the issue before us were correct, *ante*, at 3, n. 1., then we seriously erred in *Navarro Savings Assn. v. Lee*, *supra*, at 464-466, when we considered whether the trust beneficiaries were the real parties to the controversy, in light of the fact that they were not named parties to the litigation.

The Court attempts to distinguish *Navarro* on the ground that it involved not a juridical person, but rather the "distinctive common-law institution of trustees." *Ante*, at 9. Such a view is consonant with the Court's new diversity jurisdiction analysis announced in this case, but fails to take into account the actual language and analysis in *Navarro*. If the nature of the institution of trustees was sufficient to answer the question of which parties to count for diversity jurisdiction purposes in that case, the Court's discussion of whether the trust beneficiaries were real parties to the controversy would have been wholly superfluous. Given that the Court granted certiorari in that case on the very issue whether the citizenship of trust beneficiaries must be counted, and then unanimously applied the real parties to the controversy test, the discussion clearly was not superfluous.

Application of the parties to the controversy test to the limited partnership yields the conclusion that limited partners should not be considered for purposes of diversity jurisdiction. Like the trust beneficiary in *Navarro*, the limited partner "can neither control the disposition of this action nor intervene in the affairs of the trust except in the most extraordinary situations." *Navarro, supra*, at 464-465. See Uniform Limited Partnership Act § 26, 6 U. L. A. 614 (1969) (limited partner "is not a proper party to proceedings by or against a partnership, except where the object is to enforce a limited partner's right against or liability to the partnership"); Uniform Limited Partnership Act § 1001, 6 U. L. A. 371 (Supp. 1989) (derivative actions); Ariz. Rev. Stat. Ann. § 29-324 (1989) (general partners of limited partnership have duties and obligations of partners to general partnership); § 29-209 (general partner is agent of partnership); § 29-356 (limited partners limited to derivative actions); Arkoma Associates Partnership Agreement, Art. VI, § 6.1 (general partners have "exclusive and complete control of the operations"); *id.*, § 7.1 (limited partners "shall not take any part in the control or management of . . . Partnership"). And like the shareholder in *Marshall*, "for all the purposes of acting, contracting, and judicial remedy, [limited partners] can speak, act, and plead, only through [others]." *Marshall*, 16 How., at 328. In fact, the limited partner has even less power in the limited partnership than the shareholder does in a corporation. "[T]he shareholder . . . retain[s] some measure of control over management through his voting power, while the more restricted role of the limited partner permits restraint [of management] only by his refusal to concur in certain acts

for which his consent is required by law." See Note, Standing of Limited Partners to Sue Derivatively, 65 Colum. L. Rev. 1463, 1478 (1965). Without the power to "control . . . the assets" or to initiate or "control the litigation," *Navarro, supra,* at 465, the limited partner is not a real party to the controversy and, therefore, should not be counted for purposes of diversity jurisdiction. Because the majority of States has adopted the Uniform Limited Partnership Act, this rule would result in uniform treatment of limited partners for purposes of diversity jurisdiction. See Uniform Limited Partnership Act, 6 U. L. A. 172, 220 (Supp. 1989).

The commentators are in agreement that the party to the controversy test is the appropriate test to be applied to determine diversity jurisdiction with respect to limited partnerships and that the citizenship of limited partners should not be counted. See, *e.g.*, Comment, 45 U. Chi. L. Rev., at 418 (citizenship of limited partners should not be counted for purposes of diversity jurisdiction); Note, Who Are the Real Parties In Interest for Purposes of Determining Diversity Jurisdiction for Limited Partnerships?, 61 Wash. U. L. Q. 1051, 1066-1067 (1984) (same); Note, 56 Texas L. Rev., at 250-251 (real party in interest test should be applied to unincorporated business associations to determine whom to count for diversity); see also *Colonial Reality Corp. v. Bache & Co.*, 358 F.2d 178, 183 (1966) (Friendly, J.) (citizenship of limited partner should not be counted where state law declares partner is not "proper party to proceedings by or against a partnership").

The concern perhaps implicit in the Court's holding today is that failure to consider the citizenship of all the

members of an unincorporated business association will expand diversity jurisdiction at a time when our federal courts are already seriously overburdened. This concern is more illusory than real in the context of unincorporated business associations. For, despite the Court's holding today, unincorporated associations may gain access to the federal courts by bringing or defending suit as a Rule 23 class action, in which case the citizenship of the members of the class would not be considered. See Federal Diversity Jurisdiction – Citizenship for Unincorporated Associations, 19 Vand. L. Rev. 984, 991-992 (1966). Thus, I see little reason to depart in this case from our long settled practice of applying the real parties to the controversy test.

Because there is complete diversity between petitioners and the limited partnership (assuming that it should be considered a citizen) and each of the general partners, the issue presented by this case is fully resolved by application of the parties to the controversy test.

III.

Even though the case does not directly relate to the issue before us, the Court takes pains to address and distinguish *Puerto Rico v. Russell & Co.*, 288 U.S. 476 (1933). See *ante*, at 4-5. The issue in *Russell* was not diversity, but whether the suit against the *sociedad en comandita* could be removed from the Insular Court to the United States District Court for Puerto Rico on the ground that no party on one side was a citizen of or domiciled in Puerto Rico. See 288 U. S., at 478. None of the partners were citizens of Puerto Rico, but the Court

determined that the *sociedad* was and, therefore, removal was precluded. Thus, *Russell* tells us nothing about whether the citizenship of the *sociedad*'s members, unlimited or limited, should be considered for purposes of diversity jurisdiction.

In any event, the Court's attempt to distinguish *Russell* are seriously flawed. In *Russell*, the Court examined the Puerto Rican *sociedad en comandita*, which is the civil law version of the modern limited partnership. The Court delineated a series of factors and concluded that, under civil law, the *sociedad* was a "juridical person." *Id.*, at 481. Ironically, the Court in this case endorses the holding of *Russell*, despite the fact that virtually all of the factors listed are equally applicable to the modern limited partnership. The Court fails to acknowledge that our modern limited partnership, like the *sociedad*, finds its origins in the civil law. The limited partnership originated in Europe in the middle ages, first appearing in France "[u]nder the name of *la Société en comandite*, . . . mention being made of it in the most ancient commercial records, and in the early mercantile regulations of Marseilles and Montpelier." *Ames v. Downing*, 1 Bradf. Surr. 321, 329 (N. Y. 1850). The limited partnership did not find acceptance in the United Kingdom and was not a creature of the common law. F. Burdick, Law of Partnership 384-385 (2d ed. 1906). It was first introduced into this country in Louisiana and then New York. See Note, 65 Column. L. Rev., at 1464. Although a " 'creation of the civil law,' " the Puerto Rican *sociedad* was hardly " 'exotic.' " *Ante*, at 4 (quoting *Bouligny*, 382 U. S. at 151). Rather, it is yet one of many forms of the limited partnership descended from the ancient French *Societe* as is the

modern limited partnership adopted in this country. See *Ames, supra,* at 329-330 (American limited "partnership is, in fact, no novelty, but an institution of considerable antiquity, well known, understood and regulated"). It is hardly an answer to the history of the limited partnership in this country and abroad to assert that it appears 25 years after *Steelworkers v. R. H. Bouligny, Inc.*, 382 U. S. 145 (1965) See *ante,* at 6, n. 2. The "admirable consistency of our jurisprudence," *ante,* at 4, is not blemished by distinguishing between unions and limited partnerships. It is, however, severely marred by holding that an association within the continental United States is not afforded the same treatment as its virtually identical Puerto Rican counterpart. See also *ante,* at 6, n. 2 ("operative word in both the diversity statute and the removal statute at issue in *Russell* is 'citizens' "). The Court's decision today, endorsing treatment of a Puerto Rican business association as an entity while refusing to treat as an entity its virtually identical stateside counterpart, is justified neither by our precedents nor by historical and commercial realities.

For the foregoing reasons, I respectfully dissent.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 86-9201

USDA #CA 85-2295 D

ARKOMA ASSOCIATES,

Plaintiff-Respondent,

versus

C. TOM CARDEN and LEONARD L. LIMES,

Defendants-Petitioners.

Petition for Leave to Appeal an Interlocutory Order

Before POLITZ, GARWOOD, and JOLLY, Circuit Judges.

BY THE COURT:

On June 12, 1986, this Court directed that the petition of C. Tom Carden and Leonard L. Limes for leave to appeal an interlocutory order denying their motion to dismiss Arkoma Associates' action for lack of diversity jurisdiction be held in abeyance pending this Court's decision in 86-3128, Mesa Operating Limited Partnership v. Louisiana Intra State Gas Corporation. On August 18, 1986, this Court decided *Mesa Operating Limited Partnership*, holding that the citizenship of a limited partnership is determined by the citizenship of the general partners. ___ F.2d ___ (5th Cir., August 18, 1986, no. 86-3128, slip p. 9121). Based on that decision, we conclude that the petitioners have failed to establish that an appeal of the interlocutory order would materially advance the ultimate termination of the litigation as required by 28 U.S.C.

§ 1292(b). Accordingly, IT IS ORDERED that the petition is DENIED.

Appeals from the United States District Court
for the Eastern District of Louisiana
(87-3624)
(87-3917)

(December 7, 1988)

Before POLITZ, and JOHNSON, Circuit Judges, and Boyle,* District Judge.

POLITZ, Circuit Judge:**

In these consolidated appeals Magee Drilling Company (MDC), C. Tom Carden, and Leonard L. Limes challenge the judgments in favor of Arkoma Associates, a partnership, rendered July 27, 1987 and September 17, 1987. Finding no reversible error, we affirm.

---

* Hon. E. J. Boyle, Senior District Judge for the Eastern District of Louisiana, sitting by designation.

** Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

Background

This litigation arises out of Arkoma's lease of two drilling rigs to MDC, a Texas corporation. MDC maintains that it was interested in buying or leasing two rigs capable of drilling to 7,500 feet. Discussions ensued between representatives of Arkoma and MDC. Arkoma avers that it made no representations as to drilling capacity and it gave MDC ample opportunity to inspect the rigs. MDC contends that Arkoma represented that the rigs were capable of drilling to 7,500 feet and that the principal rig components consisted of new or rebuilt parts.

On June 27, 1984 the parties executed a lease agreement which expressly declared that no warranties were given. Don Magee, president of MDC and an experienced oil and gas operative, signed the lease and initialed each page on an attached rig inventory list. Carden and Limes, also experienced oil men, joined Magee in personally guaranteeing the drilling company's obligations under the lease.

MDC employees inspected the rig equipment and supervised its transportation from Oklahoma to Texas. Upon arrival, damaged and missing parts and the wrong drill pipe were discovered, and the parties amended the lease to give MDC a credit of $45,000 and other concessions.

MDC used the rigs for over five months and drilled 19 wells. MDC contends that the rigs were defective and incapable of drilling to 7,500, and that Arkoma knew of these defects. Arkoma counters that there is no evidence that the rigs could not drill to 7,500 feet because of

defective equipment, that no unusual problems were encounted [sic], and that MDC made no complaints until December 1984 when it tried to repudiate the lease.

On December 28, 1984 MDC notified Arkoma that it could no longer honor its obligations to its creditors. An attempt at compromise was unsuccessful and the following month MDC tendered the rigs to Arkoma. Arkoma accepted physical possession to protect its rigs from damage; however, it reserved its rights under the lease. MDC failed to make the February 1985 payment and Arkoma gave notice of default and accelerated the lease payments. Suit was then filed against Carden and Limes as MDC's guarantors.[1]

Carden and Limes, both Louisiana citizens, moved to dismiss for lack of diversity jurisdiction, contending that one of the partners of Arkoma was also a Louisiana citizen. The district court denied that motion but certified the jurisdictional question. We declined to accept the interlocutory appeal. Carden and Limes counterclaimed and MDC intervened, claiming violations of the Texas Deceptive Trade Practices Act.

Following a bench trial the court awarded Arkoma judgment in the amount of $467,806.25 plus interest and attorney's fees. The counterclaim and intervention were rejected. Carden, Limes, and MDC appeal.

---

[1] It is not clear from the record why Don Magee was not included as a party-defendant.

Analysis

1. Jurisdiction

The threshold issue raised on appeal is whether Arkoma properly invoked diversity jurisdiction. As found by the trial court and uncontested on appeal, two of Arkoma's general partners are citizens of Arizona and the other two are citizens of Oklahoma. One partner – claimed by Arkoma to be a limited partner – is a citizen of Louisiana, as are Carden and Limes.

The citizenship of a general partnership is determined by the citizenship of all the partners. If Arkoma is a general partnership, complete diversity of citizenship between the parties-plaintiff and parties-defendant does not exist. On the other hand, if Arkoma is a limited partnership, the citizenship of the partnership is determined by the citizenship of the general partners only; the citizenship of limited partners is irrelevant. In the latter instance, the requirements of diversity jurisdiction are met. *See Navarro Savings Association v. Lee*, 446 U.S. 458 (1980); *Mesa Operating Limited Partnership v. Louisiana Intrastate Gas Crop.*, [sic] 797 F.2d 238 (5th Cir. 1986).

The district court found that Arkoma, organized under the laws of Arizona, was a limited partnership under the laws of that state. The district court noted that while Arkoma did not comply with all of the requirements of Arizona Revised Statutes Section 29-302,[2] it had,

---

[2] Section 29-302 of the Arizona Revised Statutes provides, in pertinent part:

A. Two or more persons desiring to form a limited partnership shall:

(Continued on following page)

"in good faith, substantially complied with the provisions of the statute, and therefore is a valid limited partnership under Arizona law."

(Continued from previous page)

1. Sign and acknowledge a certificate, which shall state:

   (a) The name of partnership.

   (b) The character of the business.

   (c) The location of the principal place of business.

   (d) The name and place of residence of each member; general and limited partners being respectively designated.

   (e) The term for which the partnership is to exist.

   (f) The amount of cash and a description of and the agreed value of the other property contributed by each limited partner.

   . . .

   (i) The share of the profits or the other compensation by way of income which each limited partner shall receive by reason of his contribution.

   [Subsection (j), (k), (l), (m), and (n) relate to various rights of limited partners.]

2. File for record the certificate in the office of county recorder of the county in which the principal place of business is situated.

(Continued on following page)

Appellants maintain that the district court erred in finding that Arkoma was a limited partnership because of its "substantial compliance" with Arizona law. The record reflects that Arkoma's certificate of partnership was filed with the recorder's office in Maricopa County, Arizona on September 1, 1981. An amended limited partnership agreement was filed with the office of the Arizona Secretary of State on September 10, 1982. A second certificate of amendment was filed after the instant suit was initiated. The limited partnership agreement describes the name, place of business and purpose of the partnership, the names of the four general partners, the capital contribution of the general and limited partners, the division of profits and losses between the general and limited partners, and the rights of the limited partners. The names and addresses of the limited partners were not listed.

To the extent that the district court's finding of substantial compliance is a finding of fact, it is not clearly erroneous; to the extent it is a conslusion [sic] of law it is not in error. Thus, the juristictional [sic] challenge falters. Our recent opinion in *Mesa Operating Limited Partnership v. Louisiana Intrastate Gas Corp.* is dispositive. It rejects the arguments advanced by appellants. We find the requisite federal jurisdiction.

(Continued from previous page)

Effective July 24, 1982, section 29-302 was reenacted as section 29-308. A significant change required the filing of certificates of partnership with the Arizona Secretary of State.

2. Viability of lease and guaranty agreements

MDC, Carden, and Limes vigorously contend that the lease and guaranty agreements were vitiated by Arkoma's fraud and nondisclosures. This challenge founders on the shoals of Fed.R.Civ.P. 52(a), which directs that findings of fact by the trial court are to be accepted unless shown to be clearly erroneous.

The trial court found: that Arkoma made "no material representations or omissions as to the quality, capacity or performance of the land drilling rigs"; that Magee and another MDC representative, Joe Claus, had an opportunity to inspect the rigs before the lease was signed; that Claus thoroughly inventoried the rigs prior to the signing; that MDC transported the rigs from Oklahoma to Texas; that after their arrival in Texas, the rigs were inspected and the parties settled a dispute over inappropriate pipe and missing and damaged components by giving MDC a substantial credit; and that 19 wells were drilled in the five months after delivery without any complaint from any MDC representative of Cardin, Limes, or Magee. It is too firmly established to require citation that a finding of fact may not be characterized as clearly erroneous unless the reviewing court has a definite and firm conviction that an error has been committed. Reviewing the trial court's finding in light of the evidence presented, and giving due weight to credibility assessments, we come to no such firm conviction.

3. Surrender of the rigs

MDC, Carden, and Limes argue that Arkoma voluntarily terminated the lease when it accepted physical

possession of the rigs in January, contending that Arkoma cannot both take possession of the property and enforce an accelerated rent provision. Appellants misconstrue Texas law.

Texas law provides that a lessor may repossess leased property and yet recover future rental payments due under the lease. *Robinson v. Granite Equipment Leasing Corp.*, 553 S.W.2d 633 (Tex.Civ.App. 1977) (*writ ref'd n.r.e.*). Future rentals in compensation for damages may be recovered; a pure penalty as such may not. MDC, Carden, and Limes invite our attention to *Stewart v. Basey*, 150 Tex. 666, 245 S.E.2d 484 (1952). We find it inapposite. *Basey* involved a stipulated damages provision which the court found to be a pure penalty because it was not related to the actual damages suffered. In *Basey* the lessor repossessed the property, accelerated future rentals, and relet the property without giving the prior lessee credit against future rentals. That is not the situation at bar where there was no reletting of the drilling rigs, although Arkoma attempted to do so. The recovery granted is appropriate because the accelerated rentals accurately represent Arkoma's true loss of rentals.

4. Texas Deceptive Trade Practices claim

This issue need not long detain us. The trial court found that Arkoma did not misrepresent, either by representations of failures to disclose, "the quality, capacity of performance" of their two rigs. We have gauged that finding not clearly erroneous. Absent that factual basis, the claims under the DTPA lack vitality.

Finding no clearly erroneous finding of fact or error of law in the decisions of the district court, its judgments are AFFIRMED in all respects.

ARKOMA ASSOCIATES, Plaintiff-Counter Defendant-Appellee,

v.

C. Tom CARDEN and Leonard L. Limes, Defendants-Appellants,

and

MAGEE DRILLING COMPANY, INC., Intervenor-Counter Plaintiff-Appellant,

v.

David HEPBURN, et al., Third Party Defendants-Appellees.

ARKOMA ASSOCIATES, Plaintiff-Appellee, Cross-Appellant,

v.

C. Tom CARDEN and Leonard L. Limes, Defendants-Appellants, Cross-Appellee,

and

Magee Drilling Company, Intervenor-Appellant, Cross-Appellee.

Nos. 87-3624, 87-3917.

United States Court of Appeals, Fifth Circuit.

June 26, 1990.

Appeals from the United States District Court for the Eastern District of Louisiana.

ON REMAND FROM THE SUPREME COURT OF THE UNITED STATES

Before POLITZ and JOHNSON, Circuit Judges, and BOYLE*, District Judge.

PER CURIAM:

This matter is now before us on remand from the Supreme Court.

Invoking diversity jurisdiction Arkoma Associates, a partnership organized under the laws of Arizona, sued C. Tom Carden and Leonard L. Limes, citizens of Louisiana, as guarantors of an agreement by which Arkoma leased certain drilling equipment to Magee Drilling Company, Inc. (MDC). Carden and Limes counterclaimed. MDC, a Texas corporation with its principal place of business in Texas, intervened, urging claims against Arkoma for violation of the Texas Deceptive Trade Practices Act.

Carden and Limes sought dismissal for lack of diversity jurisdiction because a limited partner of Arkoma was a fellow Louisianian. The district court rejected this jurisdictional challenge and after a bench trial awarded judgment to Arkoma and rejected MDC's claims. Carden, Limes, and MDC appealed. We affirmed. *Arkoma Associates v. Carden*, 874 F.2d 226 (5th Cir.1988). The Supreme Court granted certiorari. Holding that the citizenship of a limited partner was relevant in the diversity jurisdiction

---

* District Judge, of the Eastern District of Louisiana, sitting by designation.

equation, the Supreme Court directed dismissal of Arkoma's claim against Carden and Limes for lack of jurisdiction. The Court remanded to us the issue presented by the judgment dismissing the claims of MDC. *Carden v. Arkoma Associates*, 494 U.S. ___, 110 S.Ct. 1015, 108 L.Ed.2d 157 (1990).

On remand, MDC maintains that the district court lacked jurisdiction over its demands in intervention because the court lacked jurisdiction over the main demand. MDC's claims, however, have an independent jurisdictional basis, discrete from that of the main demand. It is undisputed that no partner of Arkoma resides in Texas. Accordingly, there is complete diversity between Arkoma and MDC. Further, MDC's claim in intervention exceeds the jurisdictional minimum. Thus, all requisites for diversity jurisdiction under 28 U.S.C. § 1332 are satisfied.

When a separate and independent jurisdictional basis exists a federal court has the discretion to treat an intervention as a separate action, and may adjudicate it despite dismissal of the main demand if failure to do so might result in unnecessary delay or other prejudice. *Harris v. Amoco Production Co.*, 768 F.2d 669 (5th Cir.1985), *cert. denied*, 475 U.S. 1011, 106 S.Ct. 1186, 89 L.Ed.2d 302 (1986); *Hunt Tool Co. v. Moore, Inc.*, 212 F.2d 685 (5th Cir.1954); *Atkins v. State Board of Education of North Carolina*, 418 F.2d 874 (4th Cir. 1969); *Fuller v. Volk*, 351 F.2d 323 (3rd Cir.1965); *cf. Simmons v. Interstate Commerce Commissions*, 716 F.2d 40 (D.C.Cir. 1983); *Horn v. Eltra Corp.*, 686 F.2d 439 (6th Cir.1982). Such necessarily is the situation at bar where the trial court has adjudicated MDC's claim and this court has affirmed. We perceive no basis

for a reconsideration of our affirmation nor can we conceive of any purpose to be served by a remand of MDC's claims to the district court. Further, a dismissal of MDC's claims without prejudice would result only in further delay and expense to the parties and a cavalier waste of increasingly limited judicial resources, both trial and appellate.

For these reasons, the judgment of the district court rejecting the demands of MDC against Arkoma is AFFIRMED; and the judgment of the district court as it relates to the claims of Arkoma and the counterclaims of Carden and Limes is VACATED for lack of jurisdiction, and those claims are dismissed without prejudice.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Nos. 87-3624
87-3917

ARKOMA ASSOCIATES, Plaintiff-Counter Defendant-Appellee,

v.

C. Tom CARDEN and Leonard L. Limes, Defendants-Appellants,

and

MAGEE DRILLING COMPANY, INC., Intervenor-Counter Plaintiff-Appellant,

v.

David HEPBURN, et al., Third Party Defendants-Appellees.

ARKOMA ASSOCIATES, Plaintiff-Appellee, Cross-Appellant,

v.

C. Tom CARDEN and Leonard L. Limes, Defendants-Appellants, Cross-Appellee,

and

Magee Drilling Company, Intervenor-Appellant, Cross-Appellee.

Appeal from the United States District Court for the Eastern District of Louisiana

---

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion 6-26-90, 5 Cir., 198___, ___F.2d___

(July 23, 1990)

Before POLITZ and JOHNSON, Circuit Judges, and BOYLE*, District Judge.

PER CURIAM:

(✔) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Federal Rules of Appellate Procedure

---

* District Judge, of the Eastern District of Louisiana, sitting by designation.

and Local Rule 35) the Suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/s/ Henry A. Politz
United States Circuit Judge

APPENDIX B

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

ARKOMA ASSOCIATES	*	CIVIL ACTION
VERSUS	*	NO. 85-2295
C. TOM CARDEN AND LEONARD L. LIMES	*	SECTION "D"
* * * * * * * * *	*	MAG. DIV. 4

NOTICE OF MOTION TO INTERVENE

TO: Arkoma Associates
through Mitchell J. Hoffman, Esq.
4040 One Shell Square
New Orleans, LA 70139

PLEASE TAKE NOTICE that Magee Drilling Company will bring the attached motion to intervene for hearing on January 15, 1986 at 9:00 a.m. or as soon thereafter as counsel can be heard.

Respectfully submitted,

BERKE & INGOLIA
A PROFESSIONAL LAW CORPORATION
Co-Counsel for Magee Drilling Company
200 Oil & Gas Building
1100 Tulane Avenue
New Orleans, LA 70112
Telephone: 504/525-7703

By:/s/ Richard K. Ingolia
Richard K. Ingolia

/s/ Joseph M. Perry, Jr.
JOSEPH M. PERRY, JR.
Co-Counsel for Magee Drilling Company
3850 North Causeway Blvd.
Metairie, LA 70002
Telephone: 504/831-9951

CERTIFICATE

I hereby certify that a copy of the foregoing has been served upon all counsel of record by placing the same in the U.S. Mail, postage prepaid, this 31st day of December, 1985.

/s/ Richard K. Ingolia
Richard K. Ingolia

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

ARKOMA ASSOCIATES	*	CIVIL ACTION
VERSUS	*	NO. 85-2295
C. TOM CARDEN AND LEONARD L. LIMES	*	SECTION "D", MAG. 4

MOTION TO INTERVENE AS A DEFENDANT

Magee Drilling Company, a Texas Corporation, moves the Court for leave to intervene as a defendant in this action, in order to assert the defenses set forth in its

proposed answer and to assert the claims contained in its counterclaim, on which copies are hereto attached as Exhibit "A", on the ground that it is the lessee in the lease which plaintiff seeks to enforce, and as such has a defense to plaintiff's claim, and certain rights which it is entitled to enforce which present both questions of law and fact which are common to the main action.

IT IS ORDERED that Magee Drilling Company be and it is hereby granted leave to file the intervention attached hereto as Exhibit "A".

New Orleans, Louisiana this ___ day of December, 1985.

UNITED STATES DISTRICT JUDGE

Respectfully submitted,

BERKE & INGOLIA
A PROFESSIONAL LAW CORPORATION
Co-Counsel for Magee Drilling Co.
200 Oil & Gas Building
1100 Tulane Avenue
New Orleans, LA 70112

Telephone: 504/525-7703

By:/s/ Richard K. Ingolia
Richard K. Ingolia
/s/ Joseph M. Perry, Jr.
JOSEPH M. PERRY, JR.
Co-Counsel for Magee Drilling Co.
3850 North Causeway Boulevard
Metairie, LA 70002
Telephone: 504/831-9951

APPENDIX C

Rule 4. Process

(a) Summons: Issuance. Upon the filing of the complaint the clerk shall forthwith issue a summons and deliver the summons to the plaintiff or the plaintiff's attorney, who shall be responsible for prompt service of the summons and a copy of the complaint. Upon request of the plaintiff separate or additional summons shall issue against any defendants.

(b) Same: Form. The summons shall be signed by the clerk, be under the seal of the court, contain the name of the court and the names of the parties, be directed to the defendant, state the name and address of the plaintiff's attorney, if any, otherwise the plaintiff's address, and the time within which these rules require the defendant to appear and defend, and shall notify the defendant that in case of the defendant's failure to do so judgment by default will be rendered against the defendant for the relief demanded in the complaint. When, under Rule 4(e), service is made pursuant to a statute or rule of court of a state, the summons, or notice, or order in lieu of summons shall correspond as nearly as may be to that required by the statute or rule.

(c) Service.

(1) Process, other than a subpoena or a summons and complaint, shall be served by a United States marshal or deputy United States marshal, or by a person specially appointed for that purpose.

(2)(A) A summons and complaint shall, except as provided in subparagraphs (B) and (C) of this paragraph,

be served by any person who is not a party and is not less than 18 years of age.

(B) A summons and complaint shall, at the request of the party seeking service or such party's attorney, be served by a United States marshal or deputy United States marshal, or by a person specially appointed by the court for that purpose, only –

(i) on behalf of a party authorized to proceed in forma pauperis pursuant to Title 28, U.S.C. § 1915, or of a seaman authorized to proceed under Title 28, U.S.C. § 1916,

(ii) on behalf of the United States or an officer or agency of the United States, or

(iii) pursuant to an order issued by the court stating that a United States marshal or deputy United States marshal, or a person specially appointed for that purpose, is required to serve the summons and complaint in order that service be properly effected in that particular action.

(C) A summons and complaint may be served upon a defendant of any class referred to in paragraph (1) or (3) of subdivision (d) of this rule –

(i) pursuant to the law of the State in which the district court is held for the service of summons or other like process upon such defendant in an action brought in the courts of general jurisdiction of that State, or

(ii) by mailing a copy of the summons and of the complaint (by first-class mail, postage prepaid) to the person to be served, together with two copies of a notice and acknowledgment confirming substantially to form 18-A and a return envelope, postage prepaid, addressed

to the sender. If no acknowledgment of service under this subdivision of this rule is received by the sender within 20 days after the date of mailing, service of such summons and complaint shall be made under subparagraph (A) or (B) of this paragraph in the manner prescribed by subdivision (d)(1) or (d)(3).

(D) Unless good cause is shown for not doing so the court shall order the payment of the costs of personal service by the person served if such person does not complete and return within 20 days after mailing, the notice and acknowledgment of receipt of summons.

(E) The notice and acknowledgment of receipt of summons and complaint shall be executed under oath or affirmation.

(3) The court shall freely make special appointments to serve summonses and complaints under paragraph (2)(B) of this subdivision of this rule and all other process under paragraph (1) of this subdivision of this rule.

(d) **Summons and Complaint: Person to be Served.** The summons and complaint shall be served together. The plaintiff shall furnish the person making service with such copies as are necessary. Service shall be made as follows:

(1) Upon an individual other than an infant or an incompetent person, by delivering a copy of the summons and of the complaint to the individual personally or by leaving copies thereof at the individual's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein or by delivering a copy of the summons and of the complaint to an

agent authorized by appointment or by law to receive service of process.

(2) Upon an infant or an incompetent person, by serving the summons and complaint in the manner prescribed by the law of the state in which the service is made for the service of summons or other like process upon any such defendant in an action brought in the courts of general jurisdiction of that state.

(3) Upon a domestic or foreign corporation or upon a partnership or other unincorporated association which is subject to suit under a common name, by delivering a copy of the summons and of the complaint to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the defendant.

(4) Upon the United States, by delivering a copy of the summons and of the complaint to the United States attorney for the district in which the action is brought or to an assistant United States attorney or clerical employee designated by the United States attorney in a writing filed with the clerk of the court and by sending a copy of the summons and of the complaint by registered or certified mail to the Attorney General of the United States at Washington, District of Columbia, and in any action attacking the validity of an order of an officer or agency of the United States not made a party, by also sending a copy of the summons and of the complaint by registered or certified mail to such officer or agency.

(5) Upon an officer or agency of the United States, by serving the United States and by sending a copy of the summons and of the complaint by registered or certified mail to such officer or agency. If the agency is a corporation the copy shall be delivered as provided in paragraph (3) of this subdivision of this rule.

(6) Upon a state or municipal corporation or other governmental organization thereof subject to suit, by delivering a copy of the summons and of the complaint to the chief executive officer thereof or by serving the summons and complaint in the manner prescribed by the law of the state for the service of summons or other like process upon any such defendant.

(e) Summons: Service Upon Party Not Inhabitant of or Found Within State. Whenever a statute of the United States or an order of court thereunder provides for service of a summons, or of a notice, or of an order in lieu of summons upon a party not an inhabitant of or found within the state in which the district court is held, service may be made under the circumstances and in the manner prescribed by the statute or order, or, if there is no provision therein prescribing the manner of service, in a manner stated in this rule. Whenever a statute or rule of court of the state in which the district court is held provides (1) for service of a summons, or of a notice, or of an order in lieu of summons upon a party not an inhabitant of or found within the state, or (2) for service upon or notice to such a party to appear and respond or defend in an action by reason of the attachment or garnishment or similar seizure of the party's property located within the state, service may in either case be made under the

circumstances and in the manner prescribed in the statute or rule.

(f) Territorial Limits of Effective Service. All process other than a subpoena may be served anywhere within the territorial limits of the state in which the district court is held, and, when authorized by a statute of the United States or by these rules, beyond the territorial limits of that state. In addition, persons who are brought in as parties pursuant to Rule 14, or as additional parties to a pending action or a counterclaim or cross-claim therein pursuant to Rule 19, may be served in the manner stated in paragraphs (1)-(6) of subdivision (d) of this rule at all places outside the state but within the United States that are not more than 100 miles from the place in which the action is commenced, or to which it is assigned or transferred for trial; and persons required to respond to an order of commitment for civil contempt may be serviced at the same places. A subpoena may be serviced within the territorial limits provided in Rule 45.

(g) Return. The person serving the process shall make proof of service thereof to the court promptly and in any event within the time during which the person served must respond to the process. If service is made by a person other than a United States marshal or deputy United States marshal, such person shall make affidavit thereof. If service is made under subdivision (c)(2)(C)(ii) of this rule, return shall be made by the sender's filing with the court the acknowledgment received pursuant to such subdivision. Failure to make proof of service does not affect the validity of the service.

(h) Amendment. At any time in its discretion and upon such terms as it deems just, the court may allow any process or proof of service thereof to be amended, unless it clearly appears that material prejudice would result to the substantial rights of the party against whom the process issued.

(i) Alternative Provisions for Service in a Foreign Country.

(1) Manner. When the federal or state law referred to in subdivision (e) of this rule authorizes service upon a party not an inhabitant of or found within the state in which the district court is held, and service is to be effected upon the party in a foreign country, it is also sufficient if service of the summons and complaint is made: (A) in the manner prescribed by the law of the foreign country for service in that country in an action in any of its courts of general jurisdiction; or (B) as directed by the foreign authority in response to a letter rogatory, when service in either case is reasonably calculated to give actual notice; or (C) upon an individual, by delivery to the individual personally, and upon a corporation or partnership or association, by delivery to an officer, a managing or general agent; or (D) by any form of mail, requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the party to be served; or (E) as directed by order of the court. Service under (C) or (E) above may be made by any person who is not a party and is not less than 18 years of age or who is designated by order of the district court or by the foreign court. On request, the clerk shall deliver the summons to the plaintiff for transmission to the person or the foreign court or officer who will make the service.

(2) Return. Proof of service may be made as prescribed by subdivision (g) of this rule, or by the law of the foreign country, or by order of the court. When service is made pursuant to subparagraph (1)(D) of this subdivision, proof of service shall include a receipt signed by the addressee or other evidence of delivery to the addressee satisfactory to the court.

(j) Summons: Time Limit for Service. If a service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint and the party on whose behalf such service was required cannot show good cause why such service was not made within that period, the action shall be dismissed as to that defendant without prejudice upon the court's own initiative with notice to such party or upon motion. This subdivision shall not apply to service in a foreign country pursuant to subdivision (i) of this rule.

(As amended Jan. 21, 1963, eff. July 1, 1963; Feb. 28, 1966, eff. July 1, 1966; Apr. 29, 1980, eff. Aug. 1, 1980; Pub.L. 97-462, § 2, Jan. 12, 1983, 96 Stat. 2527; Mar. 2, 1987, eff. Aug. 1, 1987.)

NOTES OF ADVISORY COMMITTEE ON RULES

Note to Subdivision (a). With the provision permitting additional summons upon request of the plaintiff, compare former Equity Rule 14 (Alias Subpoena) and the last sentence of former Equity Rule 12 (Issue of Subpoena – Time for Answer).

(2)

No. 90-495

In The

Supreme Court of the United States

October Term, 1990

MAGEE DRILLING COMPANY,

Petitioner,

versus

ARKOMA ASSOCIATES, ET AL.,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

MITCHELL J. HOFFMAN*
MAX J. COHEN
LOWE, STEIN, HOFFMAN,
ALLWEISS & HAUVER
2450 Poydras Center
650 Poydras Street
New Orleans, Louisiana 70130
Telephone: (504) 581-2450

Attorneys for Respondents

* Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Whether the opinion of the Fifth Circuit Court of Appeals in *Arkoma Associates v. Carden*, 904 F.2d 5 (5th Cir. 1990), *rehearing denied*, August 2, 1990, is in conflict with this Court's decision in *United States Ex Rel. Texas Portland Cement Co. v. McCord*, 233 U.S. 157 (1914).

2. Whether a federal court can treat an intervention as a separate action that can proceed to decision after dismissal of the original action for lack of diversity jurisdiction if there are independent grounds for jurisdiction of the intervenor's claim.

3. Whether a court of appeals can affirm a district court's adjudication of claims raised in an intervention when the district court was unable to exercise its discretion to treat the intervention as a separate action because the district court erroneously believed that it had subject matter jurisdiction to hear the original action.

4. Whether strict compliance with the provisions of Rule 4 of the Federal Rules of Civil Procedure is a prerequisite to a federal court's treatment of an intervention as a separate action.

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES:

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

No. 90-495

In The

Supreme Court of the United States

October Term, 1990

MAGEE DRILLING COMPANY,

Petitioner,

versus

ARKOMA ASSOCIATES, ET AL.,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

This brief is respectfully submitted on behalf of respondents Arkoma Associates, et al., in opposition to the petition of Magee Drilling Company for a writ of certiorari to review the decision of the United States Court of Appeals for the Fifth Circuit in this case.[1]

[1] The decision of the court of appeals in *Arkoma Associates v. Carden*, 904 F.2d 5 (5th Cir. 1990), after remand from this Court, is set forth in full at page A-39 of the Appendix to petitioner's petition.

STATEMENT OF THE CASE

On May 23, 1985, Arkoma Associates ("Arkoma") filed suit against C.T. Carden ("Carden"), and Leonard L. Limes ("Limes") as the guarantors of Magee Drilling Company's ("Magee") performance as the lessee of equipment leased from Arkoma. During the course of the proceedings in the district court, Magee intervened as a party defendant and a counter-claimant, alleging, among other things, Arkoma's violation of the Texas Deceptive Trade Practices and Consumer Protection Act ("TDTPA"). This was the first time that allegations of TDTPA violations were raised in the district court. Plaintiff accepted service of the counterclaim, by mail, and filed an answer. Intervenor's Answer and Counterclaim, and Amended Answer and Counterclaim appear in the Appendix at pages A-1 through A-9.

Carden and Limes filed a motion to dismiss the main action for lack of diversity jurisdiction based on the common citizenship of Carden, Limes, and a limited partner of Arkoma. Magee did not join that motion with respect to its counterclaim. The district court denied the motion to dismiss, but certified the jurisdictional question for interlocutory appeal pursuant to 28 U.S.C. §1292(b). The Fifth Circuit Court of Appeals denied the interlocutory appeal based on its decision in *Mesa Operating Ltd. Partnership v. Louisiana Intrastate Gas Corp.*, 797 F.2d 238 (5th Cir. 1986). Thereafter, a petition for certiorari was filed in this Court and denied.

The main demand and the intervention were then tried on the merits, and judgment was rendered in favor of Arkoma on its initial demand and against Carden and

Limes on their counterclaim and Magee on its intervention. Carden, Limes, and Magee appealed. The Fifth Circuit affirmed, found diversity jurisdiction present, and denied rehearing. 874 F.2d 226 (5th Cir. 1989). Carden, Limes, and Magee again sought certiorari to this Court which was granted on May 1, 1989.

On February 27, 1990, this Court rendered its decision and held that the district court lacked jurisdiction over the initial demand because of a lack of complete diversity. 494 U.S. ___ (1990). Consequently, the Court reversed the decision of the Fifth Circuit Court of Appeals and remanded the case for disposition in accordance with its holding. This Court refused to address the jurisdictional issue regarding Arkoma and Magee on Magee's intervention in the first instance and ordered the court of appeals to resolve the issue of whether the intervention by Magee, which admittedly met the Court's complete diversity test, must fall with the main demand by Arkoma.

On June 26, 1990, the court of appeals reaffirmed its previous decision rejecting the counterclaim of Magee against Arkoma and found that the intervention was properly tried as a separate independent action, even though the main demand was dismissed for lack of complete diversity. On July 23, 1990, the court of appeals denied rehearing, and thereafter, Magee submitted an application for certiorari to this Court.

REASONS FOR DENYING THE WRIT

1. The decision of the Fifth Circuit Court of Appeals in this action does not conflict with the decision of this Court in *United States Ex Rel. Texas Portland Cement Co. v. McCord*, 233 U.S. 157 (1914).

2. The decision of the Fifth Circuit Court of Appeals in this action follows a consistent line of federal jurisprudence.

ARGUMENT

1. COMPLETE DIVERSITY EXISTED BETWEEN ARKOMA ASSOCIATES AND MAGEE DRILLING COMPANY IN THE PROCEEDINGS BELOW.

It is not disputed that complete diversity existed between Arkoma and Magee. The guidelines for complete diversity appear at 28 U.S.C. §1332 wherein Congress specifically provided, at the time this case was filed, that the federal district courts had original jurisdiction in all civil actions in which the amount in controversy exceeded the sum of $10,000.00 exclusive of interest and costs, and the controversy was between citizens of different states. Because Magee is a Texas corporation, it is a citizen of the State of Texas for diversity purposes. *See* 28 U.S.C. §1332(c). It is also undisputed that none of the general partners or limited partners of Arkoma are, or were at the time the complaint was filed, citizens of the State of Texas. Therefore, complete diversity jurisdiction existed between Arkoma and Magee at the time Magee intervened in this action. *See Arkoma Associates v. Carden*, 905 F.2d 5 (5th Cir. 1990).

2. BECAUSE COMPLETE DIVERSITY EXISTED BETWEEN ARKOMA ASSOCIATES AND MAGEE DRILLING COMPANY IN THE PROCEEDINGS BELOW, THE INTERVENTION BY MAGEE WAS PROPERLY TREATED AS A SEPARATE ACTION AND ALLOWED TO PROCEED TO DECISION EVEN AFTER THE ORIGINAL ACTION WAS DISMISSED FOR LACK OF SUBJECT MATTER JURISDICTION.

Federal courts have long held that an intervention will be treated as a separate action and that an intervenor can proceed to decision after a dismissal of the original action if there are independent grounds for jurisdiction of the intervenor's claim. 7C C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure*, §1917 at 457-59, §1920 at 491 (1986). *See Harris v. Amoco Prod. Co.*, 768 F.2d 669, 675-76 (5th Cir. 1985), *cert. denied*, 475 U.S. 1011 (1986); *Donovan v. Oil, Chemical, and Atomic Workers Int'l Union*, 718 F.2d 1341, 1351 (5th Cir. 1983), *cert. denied*, 466 U.S. 971 (1984); *Simmons v. Interstate Commerce Comm'n*, 716 F.2d 40, 46 (D.C. Cir. 1983); *Horn v. Eltra Corp.*, 686 F.2d 439, 440 (6th Cir. 1982), *cert. denied*, 475 U.S. 1011 (1986); *McKay v. Heyison*, 614 F.2d 899, 907 (3d Cir. 1980); *Atkins v. State Bd. of Educ. of North Carolina*, 418 F.2d 874, 876 (4th Cir. 1969); *Fuller v. Volk*, 351 F.2d 323, 328-29 (3d Cir. 1965); *Magdoff v. Saphin Television & Appliance, Inc.*, 228 F.2d 214, 215 (5th Cir. 1955); *Hunt Tool Co. v. Moore, Inc.*, 212 F.2d 685, 688 (5th Cir. 1954); *Alabama Elec. Coop., Inc. v. United States*, 574 F.Supp. 27, 31 n. 8 (M.D. Ala. 1983); *Equal Empl. Oppor. Comm'n v. Int'l Bhd. of Elec. Workers*, 506 F.Supp. 480, 483 (D. Mass. 1981); *Kruse v. Zenith Radio Corp.*, 82 F.R.D. 66, 69 (W.D. Pa. 1979). *See also Pasadena City Bd. of Educ. v. Spangler*, 427 U.S. 424, 430-31 (1976).

Magee does not dispute the fact that an intervenor can continue to litigate after the dismissal of the original action. As a matter of fact, one of the cases cited in Magee's brief supports that proposition. *See Harris v. Amoco Prod. Co., supra,* (the court of appeals held that the EEOC, having properly intervened in the original action, could maintain its lawsuit within the scope of the original plaintiffs' claims even after those plaintiffs had settled). Despite that concession, Magee argues, through cases that can be distinguished, that its intervention could not be maintained after the main demand was dismissed for want of jurisdiction.

Alternatively, Magee argues that the intervention could not be treated as a separate suit after the dismissal of the original action because the district court never exercised its discretion to try the intervention separately, nor was service of the intervention made in accordance with Rule 4 of the Federal Rules of Civil Procedure. These arguments are so specious that they defy logic. How could the district court have exercised its discretion to hear the intervention independently of the main action when the district court erroneously believed that subject matter jurisdiction existed for the entire matter? To argue otherwise would be to suggest that the district court should have anticipated this Court's dismissal of the main action and, therefore, should have protected the record with a discussion of how it would use its discretion in the event a higher court decreed that it lacked subject matter jurisdiction.

Magee's argument that the intervention could not be treated as an original suit merely because service was not effected pursuant to Rule 4 of the Federal Rules of Civil

Procedure is, likewise, nonsensical. It is axiomatic that any objection to service of process is automatically waived when an appearance is made. In this case, Magee intervened in the lawsuit and filed an answer and amended answer to Arkoma's complaint and a counterclaim and amended counterclaim against Arkoma, alleging, among other things, an entirely new cause of action – violations of the TDTPA. Magee effected service by regular mail. Thereafter, Arkoma answered the intervention and amended intervention and joined issue on all issues raised by Magee. Any defect in service which, ironically, is being raised now by the very party that may have effected service improperly, became moot when Arkoma answered the intervention.

It is important to note that the claims raised by Magee in its intervention could have been filed in any district court that could assert jurisdiction over Arkoma. Magee chose the Eastern District of Louisiana. It filed a complaint, effected service by mail, received an answer, participated in discovery, tried its case, lost, appealed, and now seeks to ask this Court to ignore all of its actions to get a second bite at the apple. Magee's intervention set forth issues stemming from the lease agreement, while Carden's and Limes' claims were related to their defenses to the guarantee agreement. In addition, Magee brought an entirely new cause of action claiming Arkoma's violation of the TDTPA. Magee was neither a necessary nor indispensable party to the main demand. Carden and Limes were neither necessary nor indispensable parties to the intervention. Under these circumstances, district courts have the discretion to treat an intervention as a

separate action in order to adjudicate the claims raised by the intervenor. *Harris v. Amoco Prod. Co.*, 768 F.2d at 675.

3. THE DECISION OF THE FIFTH CIRCUIT COURT OF APPEALS IS NOT IN CONFLICT WITH THIS COURT'S DECISION IN *UNITED STATES EX REL. TEXAS PORTLAND CEMENT CO. V. MCCORD*.

Magee argues that the fate of its intervention must abide by the disposition of the main demand because Magee's intervention was tried as an ancillary matter appended to the main demand. In support of its position, Magee cites *McCord, supra*, as well as a line of Fifth Circuit cases dating back to 1927. However, the cases cited by Magee, if read in their entirety and not merely cited piecemeal, are factually distinguishable. They are not authority for the proposition that an intervention can never be maintained after the dismissal of the main demand because of the court's lack of subject matter jurisdiction over the original action.

In *McCord*, W. Illingsworth, a creditor who had performed work for the United States pursuant to a contract entered into between the United States and McCord, had no independent grounds to file suit. His participatory rights were conditioned upon a specific federal statute that permitted him, as a beneficiary under the bond supplied by McCord, to intervene in an action instituted by the United States or by other creditors in the name of the United States if the United States did not bring suit within six months after the complete performance and settlement of the contract. Mr. Illingsworth intervened in the already existing lawsuit, which had been filed prematurely by other creditors, in an attempt to "breathe life

into a 'non-existent' law suit." *Fuller v. Volk*, 351 F.2d at 328. The Court held that the intervention, which was brought at a time when the original suit could have been brought, could not cure the defect in the original suit. The Court held that Mr. Illingsworth's right to intervene and file a claim, which was conferred by a particular statute setting forth specific requirements, presupposed an already existing lawsuit properly brought under the terms of the statute. Simply stated, the Court held that there was no case in which to intervene, and the intervention could not cure the defect in the original suit.

Specifically addressing the issue of whether the intervention could be treated as an original suit, the Court held that it could not because no service of the intervention was made or was attempted to be made, as required by the particular statute at issue in the case, when original actions were brought by creditors. That statute specified a particular method of service, which, apparently, could not be waived:

> [I]n all suits instituted under the provisions of this Act such personal notice of the pendency of such suits, informing them of their right to intervene as the court may order, shall be given to all known creditors, and in addition thereto notice of publication in some newspaper of general circulation, published in the State or town where the contract is being performed, for at least three successive weeks, the last publication to be at least three months before the time limited therefor.

McCord, 233 U.S. at 161, n. 1.

The Magee intervention was not filed to attempt to revive a non-existent lawsuit, nor was it filed to cure any

defect in the original suit. The intervention was brought voluntarily by a dispensable third-party who gratuitously joined the original defendants in alleging defenses, and, more importantly, who also brought a counterclaim that included a totally separate and independent cause of action than the counterclaim brought by Carden and Limes. In addition, had Magee simply filed a separate lawsuit and moved to consolidate, Arkoma's answer would have rendered moot any failure on the part of Magee to serve the complaint as specified in Rule 4 of the Federal Rules of Civil Procedure.

The other cases cited by Magee also can be distinguished. In *Kendrick v. Kendrick,* 16 F.2d 744 (5th Cir. 1926), *cert. denied,* 273 U.S. 758 (1927), an intervention was filed in an attempt to change the nature of the pending suit in order to create jurisdiction for that suit. The intervenors were actually indispensable parties in the original suit, which did not meet the minimum amount in controversy requirement. The court characterized the intervening petition as "merely a contrivance between friends for the purpose of founding a jurisdiction which otherwise would not exist. . . . " *Id.* at 746.

Once again, in the case at bar, Magee did not intervene in an attempt to change the nature of the pending suit or to breathe life into a defective suit. Magee was not an indispensable party to the original suit. That suit was simply a suit on a guaranty agreement. Arkoma did not have to sue Magee to collect damages under the guaranty. Similarly, Magee's claims in the intervention set forth completely independent issues and requests for relief.

Truvillion v. King's Daughters Hosp., 614 F.2d 520 (5th Cir. 1980), *rehearing denied*, 618 F.2d 781 (5th Cir. 1980), did not involve an intervention. The question raised in *Truvillion* was whether the filing of a jurisdictionally defective suit by the EEOC, in which the charging party did not intervene, cut off the charging party's right to bring her own suit under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000, *et seq*. Since a private plaintiff's sole avenue of redress is by intervention if the EEOC files suit, *id*. at 525, an intervention in an EEOC case cannot be considered an original action, and there are no independent grounds for jurisdiction of the intervenor's claim.

Obviously, the case at bar does not involve an EEOC matter wherein the charging party's right to intervene is the sole avenue of redress if the EEOC files suit. Furthermore, Magee's intervention, unlike an intervention in an EEOC case, constituted an original action against Arkoma with completely independent jurisdictional grounds which could have been filed as a separate suit in any federal district court.

In *Non Commissioned Officers Ass'n of the United States v. Army Times Publishing Co.*, 637 F.2d 372 (5th Cir. 1981), *modified and reinstated*, 650 F.2d 83 (5th Cir. 1981), subject matter jurisdiction in the original action, or the lack thereof, was not at issue. At issue was whether a party could intervene in a case which had been settled four years earlier.

In the case at bar, Arkoma clearly had a cause of action which, unfortunately, was filed in a court which this Court later held did not have subject matter jurisdiction. Filing an intervention in this type of case, in which

there is a viable cause of action, is clearly different than attempting to file an intervention into a matter which had been settled four years earlier and previously dismissed.

In *Harris v. Amoco Prod. Co., supra,* the intervenor, the EEOC, was allowed to continue the case once the plaintiffs had settled. Once again, subject matter jurisdiction was not at issue. Furthermore, a careful reading of *Harris* shows that an intervenor's "participatory rights," that is, for example, the right to move to dismiss the proceeding or to challenge the subject matter jurisdiction of the district court, "remain subject to the intervenor's threshold dependency on the original parties' claims. . . ." *Id.* at 675. However, an intervenor does not necessarily participate in the original action when it files a completely independent action which asserts new and independent issues and claims for damages. In that event, if the main action is dismissed or the plaintiffs drop out, the court has the "discretion to treat the pleading of an intervenor as a separate action in order that it might adjudicate the claims raised by the intervenor." *Id., citing Fuller v. Volk,* 351 F.2d at 328.

Perhaps Magee's intervention should have commenced as a separate action and been consolidated with the Arkoma claim, but that was not done. However, the name assigned to a pleading is not necessarily binding on a court. To achieve substantial justice, a court should look beyond the name and focus on the content of the pleading. *See* 71 C.J.S. *Pleading* §5 (1951). *See also In Re Gen. Motors Class E Stock Buyout Sec. Litig.,* 694 F.Supp. 1119, 1131 (D. Del. 1988). Mere form should not prevail over substance.

4. MAGEE'S INTERVENTION WAS NOT AFFECTED BY THE DISMISSAL OF THE MAIN DEMAND BECAUSE THE INTERVENTION WAS NOT ANCILLARY TO THE MAIN DEMAND, AND THERE EXISTED INDEPENDENT JURISDICTIONAL GROUNDS TO SUPPORT THE INTERVENTION.

When the district court granted Magee's motion to intervene, it did not specify the grounds for permitting the intervention. However, for several reasons, it can be argued that the intervention was merely permissive. First, if Magee sought to intervene as of right pursuant to Rule 24(a) of the Federal Rules of Civil Procedure, it would have so specified because intervention pursuant to this section is preferable to permissive intervention pursuant to subsection (b). Second, the circumstances did not exist to permit intervention of right pursuant to subsection (a). A statute of the United States did not confer an unconditional right to intervene, and Magee's interest was represented adequately by the existing parties. In addition, Magee's claims and defenses, other than its claim under the TDTPA, were almost identical to the claims and defenses of Carden and Limes, the existing parties, thus providing common questions of law and fact.

Since Magee's intervention was permissive under Rule 24(b), it was not ancillary to the main proceeding, and therefore, it was not affected by the dismissal of the main demand. *Hunt Tool Co. v. Moore, Inc.*, 212 F.2d at 688; *Schomber By Schomber v. Jewel Companies, Inc.*, 614 F.Supp 210, 213 (N.D. Ill. 1985); *Fritts v. Niehouse*, 604 F.Supp. 823, 826 (W.D. Mo. 1984), *aff'd*, 774 F.2d 1170 (8th Cir. 1985).

While Magee correctly cites the general rule that a prerequisite of an intervention is an existing suit within the court's jurisdiction, there are two recognized exceptions to this rule. First, an intervenor with an independent basis for jurisdiction may be treated as stating a wholly separate claim. *Horn v. Eltra Corp.*, 686 F.2d at 440, *citing Atkins v. State Bd. of Educ. of North Carolina, supra; Fuller v. Volk, supra.* Second, an intervenor who becomes a member of a class action may be permitted to proceed with the action even though the claim of the named plaintiff has become moot. *Id.* (Citation omitted.) In *Fuller, supra,* the main demand was dismissed because the court lacked subject matter jurisdiction. However, the court stated that the intervention would be maintained if independent grounds for jurisdiction existed. The court wrote:

> [A] court has discretion to treat the pleading of an intervenor as a separate action in order that it might adjudicate the claims raised by the intervenor. [Citations omitted.] This discretionary procedure is properly utilized in a case in which it appears that the intervenor has a separate and independent basis for jurisdiction and in which failure to adjudicate the claim will result only in an unnecessary delay. By allowing the suit to continue with respect to the intervening party, the court can avoid the senseless "delay and expense of a new suit, which at long last will merely bring the parties to the point where they now are." [Citation omitted.]

Id. at 328-29. *See Alabama Elec. Coop., Inc. v. United States, supra,* (intervention is properly before the court if it has an independent basis for jurisdiction, even if the court did not have subject matter jurisdiction over the main action); *Equal Empl. Oppor. Comm'n v. Int'l Bhd. of Elec.*

Workers, supra, (an intervention can continue even if the main action is dismissed for jurisdictional deficiencies). *See also Simmons v. Interstate Commerce Comm'n, supra,* (intervenor with independent grounds for jurisdiction can continue litigation even if court lacked original subject matter jurisdiction); *McKay v. Heyison, supra,* (intervention is discretionary even if the court lacked jurisdiction over the original claim).

In *Alabama Elec. Coop., Inc. v. United States,* the plaintiffs, which the court characterized as "private plaintiffs," filed suit in federal district court challenging the validity of certain actions of the Interstate Commerce Commission. The intervenors, which the district court labeled "state plaintiffs," intervened in the lawsuit seeking similar relief. The court held that the "private plaintiffs' " challenges to the validity of certain ICC actions were exclusively within the jurisdiction of the courts of appeals. Therefore, the court dismissed the "private plaintiffs' " action. However, the court held that the "state plaintiffs' " challenges had a jurisdictional basis independent of the original plaintiffs. Therefore, the court held that the "state plaintiffs' " challenges, by intervention, nevertheless were properly before the court and could continue even after the dismissal of the private plaintiffs' claims.

In *Equal Empl. Oppor. Comm'n v. Int'l Bhd. of Elec. Workers,* the EEOC brought suit against the International Brotherhood of Electrical Workers and its Local 103 for redress of alleged retaliatory actions. The charging party intervened of right and filed his own complaint against Local 103 and the International Brotherhood of Electrical Workers. While the EEOC's suit was dismissed for its

failure to show the jurisdictional prerequisites for its own suit, the court held that the charging party had an independent jurisdictional basis for his claim against the International Brotherhood of Electrical Workers, and therefore, the charging party could continue to litigate his claim even though the EEOC's suit had been dismissed for jurisdictional defects.

In *Simmons v. Interstate Commerce Comm'n*, the ICC issued two notices proposing separate reductions in the annual reporting requirements of, respectively, Class I railroads and Class I and II motor carriers. The plaintiff filed a petition to review both rules. More than sixty days after the entry of the final order of the agency, the International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America (IBT) moved to intervene in the action. The court found that the plaintiff lacked a jurisdictional basis to bring his action. Furthermore, the court dismissed IBT's intervention because IBT had no jurisdictional basis of its own. In its reasoning, the court implied that even though the original party lacked a jurisdictional basis for his cause of action, the intervenor could have continued the lawsuit if it had an independent jurisdictional basis to do so.

> An intervenor lacking an independent jurisdictional basis cannot maintain suit where the court lacked original subject matter jurisdiction. . . . The cases cited by IBT do not dispute this fundamental rule. All but one of them involve either (1) continuation of a suit by an intervenor after the party who originally provided valid subject matter jurisdiction has left the case, . . . or (2) continuation of a suit by an intervenor who himself provided such jurisdiction . . . . IBT must be dismissed from this suit

> because the original party lacked a jurisdictional basis *and* because IBT has no jurisdictional basis of its own. [Citations omitted. Emphasis added.]

Simmons v. Interstate Commerce Comm'n, 716 F.2d at 46.

CONCLUSION

It is clear that an independent basis for jurisdiction existed with regard to the intervention filed by Magee. The jurisdictional amount was in excess of $10,000.00, and complete diversity existed between all of Arkoma's general and limited partners and Magee. The claims by Magee were independent of the existing litigation and just as easily could have been filed as a separate action. That Magee chose to avoid the separate filing of a complaint and likely consolidation should not detract from the substance of the proceeding.

It is also clear that the district court had subject matter jurisdiction over the intervention, even though the court lacked subject matter jurisdiction over the main action. Therefore, it is equally clear that the judgment dismissing Magee's intervention is valid and should be maintained as the Fifth Circuit has already held.

Relitigation will cause a senseless and expensive delay of the final resolution of this case and would be, as the Fifth Circuit aptly stated, "a cavalier waste of increasingly limited judicial resources . . . ." *Arkoma Associates v. Carden*, 904 F.2d at 7. Magee, in essence, brought a separate claim which it lost. Magee did not have to file its intervention, and this Court should not permit Magee's

manipulation of the judicial system to give it an unfair advantage by allowing it to retry its case.

For the foregoing reasons, this Court should deny Magee's petition for writ of certiorari.

Respectfully submitted,

MITCHELL J. HOFFMAN*
MAX J. COHEN
LOWE, STEIN, HOFFMAN,
ALLWEISS & HAUVER
2450 Poydras Center
650 Poydras Street
New Orleans, Louisiana 70130
Telephone: (504) 581-2450

Attorneys for Respondents
* Counsel of Record

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

ARKOMA ASSOCIATES	*	CIVIL ACTION
VERSUS	*	NO. 85-2295
C. TOM CARDEN AND LEONARD L. LIMES	*	SECTION D, MAG. 4
MAGEE DRILLING COMPANY, INTERVENOR	*	

* *

INTERVENOR'S ANSWER AND COUNTERCLAIM

Intervenor, Magee Drilling Company (hereafter "Magee"), a Texas Corporation, responds to the complaint of Arkoma Associates (hereafter "Plaintiff"), as follows:

I.

FIRST DEFENSE

The complaint fails to state a claim against Magee upon which relief can be granted.

II.

SECOND DEFENSE

Answering categorically the numbered paragraphs of Plaintiff's complaint, Magee shows:

A) The allegations of Paragraph 1 are admitted;

B) The allegations of Paragraph 2 are denied;

C) The allegations of Paragraph 3 are denied, except to admit that Plaintiff and Magee executed a document styled "equipment lease" dated June 27, 1984 which was

amended July 18, 1984 by an instrument attached to the original answer of C.T. Carden and Leonard L. Limes (hereafter "Carden/Limes") as Exhibit "A" hereafter "Lease");

D) The allegations of Paragraph 4 are denied except to admit that Carden/Limes executed a guaranty agreement which is a written document, the content of which is the best evidence of the guaranty, all allegations in conflict therewith being denied;

E) The allegations of Paragraph 5 are admitted;

F) The allegations of Paragraph 6 are denied except to admit that Carden/Limes received a letter dated February 18, 1985 from James D. Veselich, attorney at law, purporting to notify them of an alleged default by Magee under the terms of the Lease, and acknowledging acceptance of the possession of the equipment which was the subject of the Lease (hereafter "Equipment") by Plaintiff and the receipt of all rental due in connection therewith through the date of repossession;

G) The allegations of Paragraph 7 are denied; and

H) The allegations of Paragraph 8 are denied.

III.

THIRD DEFENSE

Further answering, Defendants show:

A) The Lease is void and Plaintiff's claim unenforceable for the following reasons:

1) The Plaintiff failed to deliver the Equipment, to such an extent as to constitute:

a) Fraud in the execution of the Lease or *fraud in the factum;* and

b) Failure or partial failure of consideration;

2) To the extent that the Lease provides that Plaintiff may regain possession of the Equipment and yet hold Magee and Defendants liable for rental accruing thereafter, the Lease is unconscionable;

3) Those provisions in the Lease calling for the payment of future rental following Plaintiff's repossession of the Equipment constitute an unlawful penalty clause;

4) Plaintiff, Carden/Limes, and Magee repudiated and/or voluntarily terminated the Lease at the time Plaintiff accepted delivery of the Equipment from Magee;

5) By accepting delivery of the Equipment from Magee, Plaintiff:

a) Elected its remedy of Lease cancellation; and

b) Is now estopped to claim enforcement of the Lease;

6) There was no meeting of the minds of Plaintiff, Defendants, and Magee as to the quantity or quality of the Equipment; and

7) Plaintiff failed to minimize any damages which it has sustained;

B) Magee paid all rental due under the Lease until such time as Plaintiff accepted possession of the Equipment from Magee;

C) In the event that this Court finds Magee to be indebted to Plaintiff for any sums whatsoever, Magee is entitled to setoff against any such sums all sums for

which Plaintiff is indebted to Magee, as hereinafter alleged.

IV.

COUNTERCLAIM

Now, assuming the position of counterclaimant, Magee, with respect represents:

A) The following are made defendants in this counterclaim:

1) Arkoma Associates (hereafter "Arkoma"), a partnership organized under the laws of the state of Arizona;

2) David A. Hepburn (hereafter "Hepburn"), domiciled in the State of Arizona;

3) Eldon Qualls (herafter "Qualls"), domiciled in the State of Oklahoma;

4) Richard K. Ledbetter (hereafter "Ledbetter") domiciled in the State of Oklahoma;

5) Dudley B. Merkel (hereafter "Merkel"), domiciled in the State of Arizona; and

B) On information and belief, it is alleged that Hepburn, Qualls, Ledbetter, and Merkel (hereafter collectively "Partners") are designated as the general partners of Arkoma and, as such, liable, jointly, severally and *in solido*, with Arkoma for the obligations of Arkoma.

C) Arkoma, through the Partners, its agents, employees, and/or officers represented to Magee and Carden/Limes that the Equipment leased by Arkoma to Magee would be be (sic) fully outfitted, ready for use, and capable of drilling to a depth of 7,500 feet (hereafter

collectively "Representations") when, in fact, it was not (hereafter collectively "Deficiencies").

D) The Deficiencies were non-apparent to Magee and Carden/Limes or hidden from their view by Arkoma and/or its Partners, agents, employees, and/or officers, but were well known to Arkoma and/or its Partners, agents, employees, and/or officers.

E) Magee and Carden/Limes relied upon the Representations in entering into the Lease.

F) As a result of the Deficiencies, the Equipment could not be used, which resulted in the financial collapse of Magee and the loss of work and revenues amounting to approximately $1,000,000.00.

G) In an effort to render the Equipment usable as represented, Magee expended approximately $500,000.00, to no avail, for which it is entitled to recover of Arkoma.

WHEREFORE, Intervenor, Magee Drilling Company, prays for judgment:

1. On the main demand in its favor and against the plaintiff, Arkoma Associates, rejecting the demands of Arkoma Associates with prejudice at the costs of Arkoma Associates, and

2. On the counterclaim, in favor of Magee Drilling Co., and against Arkoma Associates, David A. Hepburn, Eldon Qualls, Richard K. Ledbetter, and Dudley B. Merkel, jointly, severally, and *in solido* in the full and true sum of $1,500,000.00 together with legal interest thereon from

the date of judicial demand until paid and for all costs of these proceedings.

BERKE & INGOLIA
A PROFESSIONAL LAW
CORPORATION
Co-Counsel for Magee Drilling
Company
200 Oil & Gas Building
1100 Tulane Avenue
New Orleans, LA 70112
Telephone: 504/525-7703
By: /s/ Richard K. Ingolia
Richard K. Ingolia

JOSEPH M. PERRY
Co-Counsel for Magee Drilling
Company
3850 North Causeway Boulevard
Metairie, LA 70002
Telephone: 504/831-9951

(Certificate of Service omitted in printing)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

ARKOMA ASSOCIATES	*	CIVIL ACTION
	*	
VERSUS	*	NO. 85-2295
C. TOM CARDEN AND LEONARD L. LIMES	*	SECTION "D"
	*	
	*	MAG. DIV. 4

****

INTERVENOR'S AMENDED ANSWER AND COUNTERCLAIM

The amended answer and counterclaim of Intervenor, Magee Drilling Company (hereafter "Magee"), a Texas Corporation, respectfully represents that it desires to amend its original answer and counterclaim in the following particulars:

I.

By adding the following additional defense:

IV.

FOURTH DEFENSE

Further answering, Magee shows:

A) The Lease is void and Plaintiff's claim unenforceable because of Plaintiff's untrue assertions that the Equipment was of a quality sufficient to execute the work for which it was intended; and

B) The Lease is void and Plaintiff's claim unenforceable because of Plaintiff's failure to disclose the true quality of the Equipment.

II.

By adding the following paragraphs to the counterclaim:

H) The conduct of Arkoma and the Partners disclose a conscious indifference to the rights of Magee rendering Arkoma and the Partners liable to Magee for exemplary and punitive damages.

I) The facts alleged as set out in paragraphs C, D and E are violations of the Texas Deceptive Trade Practices And Consumer Protection Act rendering Arkoma and the Partners liable to Magee for triple damages.

WHEREFORE, Intervenor, Magee Drilling Company, prays for judgment:

1. On the main demand in its favor and against the plaintiff, Arkoma Associates, rejecting the demands of Arkoma Associates with prejudice at the cost of Arkoma Associates, and

2. On the counterclaim, in favor of Magee Drilling Company, and against Arkoma Associates, David A. Hepburn, Eldon Qualls, Richard K. Ledbetter, and Dudley B. Merkel, jointly, severally, and *in solido* in the following amounts:

1. $1,500,000.00 compensatory damages;

2. $1,000,000.00 exemplary and punitive damages; and

3. $4,500,000.00 triple damages;

together with reasonable attorney fees and legal interest thereon from the date of judicial demand until paid and for all costs of these proceedings.

BERKE & INGOLIA
A PROFESSIONAL LAW
CORPORATION
Co-Counsel for C.T. Carden
and Leonard L. Limes
200 Oil & Gas Building
1100 Tulane Avenue
New Orleans, LA 70112
Telephone: 504/525-7703

By: /s/ Richard K. Ingolia
Richard K. Ingolia

JOSEPH M. PERRY, JR.
Co-Counsel for C. T. Carden
and Leonard l. Limes
3850 North Causeway Blvd.
Metaire, LA 70002
Telephone: 504/831-9951

(Certificate of Service omitted in printing)

No. 90-495

In The

Supreme Court of the United States

October Term, 1990

MAGEE DRILLING COMPANY,

Petitioner,

versus

ARKOMA ASSOCIATES, et al.,

Respondents.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

PETITIONER'S REPLY BRIEF

RICHARD K. INGOLIA*
KENNETH J. BERKE

BERKE & INGOLIA
200 Oil & Gas Building
1100 Tulane Avenue
New Orleans, Louisiana 70112
Telephone: (504) 525-7703

Counsel for Petitioner
**Attorney of record for Petitioner*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES:

STATUTES:

No. 90-495

In The

Supreme Court of the United States

October Term, 1990

MAGEE DRILLING COMPANY,

Petitioner,

versus

ARKOMA ASSOCIATES, et al.,

Respondents.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

PETITIONER'S REPLY BRIEF

TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES

ARGUMENT

MAY IT PLEASE THE COURT:

The larger part of respondent's opposition brief discusses a situation which does not exist in this case, to wit: jurisdiction to hear an intervention after the dismissal of the original claim. That situation is not present here. This

case, including the intervention, was tried by the District Court under the erroneous assumption that diversity jurisdiction existed among respondent and the defendants when in fact it did not. Therefore, authority relied on by respondent such as *Hunt Tool Company v. Moore, Inc.*, 212 F. 2d 685 (5th Cir. 1954) has no application here. The controlling authority here is this Court's opinion in *United States Upon the Relation and for the Use and Benefit of Texas Portland Cement Company, et al. v. McCord*, 233 U. S. 157, 34 S. Ct. 550, 58 L. Ed. 893 (S. Ct. 1914) wherein it was held that the right to intervene presupposes the existence of a viable suit in which an intervention may be made. Such a suit did not exist in this case.

Absence of Diversity Jurisdiction Ab Initio

Respondent ignores the fact that the jurisdiction of a Federal Court is fixed at the commencement of a civil action as this Court held in *Smith v. Sperling, et al.*, 354 U. S. 91, 77 S. Ct. 1112, 1 L. Ed. 2d 1205 (S. Ct. 1957) relying on *Mollan v. Torrance*, 22 U. S. (9 Wheat.) 537, 6 L. Ed. 154 (S. Ct. 1824) in which it was held that:

> It is quite clear that the jurisdiction of the Court depends upon the state of things at the time of the action brought, and that after vesting it cannot be ousted by subsequent events.

If this rule is applied to the present case, it is clear that the District Court lacked jurisdiction *ab initio* in view of this Court's ruling in *Carden, et al. v. Arkoma Associates*, 494 U. S. ___, 110 S. Ct. 1015, 108 L. Ed. 2d 157 (S. Ct. 1990) which found that there was no diversity of citizenship among defendants and respondent, and that, therefore, there was no subject matter jurisdiction at the

commencement of this litigation. As a consequence, it follows that the discretion which the Court of Appeals found to have been exercised to allow Magee's intervention could not have been lawfully exercised in that a court without jurisdiction may not discharge any function including the exercise of its discretion.

In fact, the District Court did not exercise discretion to hear Magee's intervention as an independent suit after dismissal of respondent's original claim. The sequence of events relative to defendants' motion to dismiss for lack of diversity jurisdiction and Magee's attempt to intervene is as follows:

1. Suit filed May 23, 1985;
2. Magee's motion to intervene filed December 31, 1985;
3. Denial of Magee's motion to intervene by the magistrate entered January 30, 1986;
4. Defendants' motion to dismiss for lack of diversity jurisdiction filed February 10, 1986;
5. District Court's denial of defendants' motion to dismiss for lack of diversity jurisdiction and certification of question of jurisdiction to Court of Appeals for interlocutory appeal entered April 4, 1986;
6. District Court's reversal of magistrate's denial of Magee's motion to intervene entered June 26, 1986;
7. Court of Appeals' denial of defendants' application for interlocutory appeal entered September 18, 1986.

As set out above, Magee's motion to intervene had previously been denied at the time defendants filed their

motion to dismiss which is the reason why Magee did not join in the motion with defendants. Magee was not a party. It could hardly join in anything. It is therefore difficult to discern what significance respondent perceives in the fact that Magee did not join in defendants' motion to dismiss for lack of diversity jurisdiction (Opposition Brief page 2).

In denying defendants' interlocutory appeal, the Court of Appeals found that diversity of citizenship existed among defendants and respondent. No consideration of Magee's citizenship was involved in the determination of the jurisdiction pursuant to which the District Court tried this case.

Cases such as *Hunt Tool Company v. Moore, Inc.*, supra, cited at pages 5 and 13 of respondent's brief, wherein an intervention was allowed to survive the settlement of the original claim, are of no comfort to respondent in that jurisdiction to hear the original claim existed at the commencement of the suit.

Respondent's statement at page 6 of its brief in opposition that, "Magee does not dispute the fact that an intervenor can continue to litigate after the dismissal of the original action," asserts an irrelevant truism. As pointed out above, Magee did not continue to litigate in the District Court, in the absence of defendants, Carden and Limes, after dismissal of respondent's original claim. It was not until the case reached this Court that the absence of jurisdiction at the commencement of the action was determined. At that point, the time for an alleged exercise of discretion had long since passed, and in any event, was never exercised.

Both Magee and respondent cite *Simmons v. Interstate Commerce Commission, et al.*, 716 F. 2d 40 (D. C. Cir. 1983), an opinion written by Justice Scalia. Although language regarding intervention appears in *Simmons*, the cited case arose in an entirely different procedural context than the present case. There was no district court in *Simmons*. Instead, there was an administrative tribunal in which no intervention was filed by the labor union. Only after the case was on appeal did the labor union attempt to intervene. At that point there were three defects in the appellate intervention: (1) the labor union had not been a party in the administrative proceeding. (2) The parties appealing the administrative decision were not "aggrieved parties" as required by the statute under which the administrative proceeding was brought. (3) Since there was no proper appeal before the appellate court, there was no valid proceeding in which the labor union could intervene. Under such conditions, Justice Scalia wrote:

> . . . an intervenor lacking an independent jurisdictional basis cannot maintain suit where the court lacked original subject matter jurisdiction.
>
> The cases cited by IBT do not dispute this fundamental rule . . .

The "fundamental rule" to which Justice Scalia referred was that which would have required a district judge to exercise his discretion to hear an intervention after the principal demand had been settled or dismissed. At that juncture, the district judge would have considered whether the intervention could have been treated as a separate independent suit. That could never have happened in *Simmons*. (1) There was no intervention or participation by the labor union at the lower administrative

level. Therefore, there was no claim by the labor union which could have been heard as an independent action. (2) There was no district judge possessed of the power to exercise discretion had there been an intervention. In *Simmons* the intervention was not filed until the case was on appeal. An appellate court, Justice Scalia implied, could not exercise the discretion which might have been exercised by a district judge faced with a surviving independent claim after the original claim had been dismissed.

Clearly, Magee, the intervenor here, did not continue this action as the sole protagonist after dismissal of respondent's original claim. Dismissal came only after trial of both the principal action and the intervention on the mistaken assumption that the court had jurisdiction over the original action when in fact it did not. This case does not meet the conditions suggested by *Simmons*. Magee's intervention was tried as an ancillary matter appended to respondent's original demand, and the trial judge did not exercise discretion, one way or the other, respecting the intervention.

Requirements Necessary To Treat Intervention As Original Suit

This Court held in *United States Upon the Relation and for the Use and Benefit of Texas Portland Cement Company, et al. v. McCord*, supra, that:

> These rights to intervene and to file a claim, conferred by the statute, presupposes an action duly brought under its terms . . .
>
> Nor do we think that the intervention could be treated as an original suit. No service was made

> or attempted to be had upon it as required by the statute when original actions are begun by creditors. As we read the certificate, the intervention was what it purported to be – an appearance in the original suit, already brought, and in our view must abide the fate of that suit.

In its brief, respondent entirely misses the point of the absence of *Rule 4, Federal Rules of Civil Procedure* service of process. Magee does not contend that service of the intervention was invalid (as suggested by respondent), but that service was made only as is required *for a motion,* not as is required for a separate independent action. In the present suit, the intervention was not served on respondent pursuant to *Rule 4*. Therefore, according to *McCord,* it may not be treated as an original suit.

Nature of Magee's Intervention

At page 13 of its brief, respondent asserts that Magee did not specify whether it sought to intervene of right or permissively. This assertion is in error. As will appear from Magee's memorandum in support of its motion to intervene filed in the district court, a copy of which appears in the Appendix at page A-1, Magee sought intervention of right. In support of this position, Magee pointed out that it was the lessee of the equipment lease entered into with respondent as lessor, and therefore had an interest in the transaction at issue in the case. In any case, as the Fifth Circuit held in *Truvillion v. King's Daughters Hospital,* 614 F. 2d 520 (5th Cir. 1980) at page 526, no one may intervene in a defective suit, and it is irrelevant whether the intervention is permissive or unqualified.

CONCLUSION

The Court of Appeals errs in its belief that there exists discretion to treat Magee's intervention as a separate suit. Exercise of such discretion is proper only in those cases in which there is a an original basis for jurisdiction. As there was no valid basis for diversity jurisdiction at the beginning of this suit, there could be no validity to the District Court's order allowing Magee's intervention. Therefore, everything which occurred herein after defendants filed their motion to dismiss should be treated as null. As pointed out in Magee's application for certiorari, the Court of Appeals' own jurisprudence requires the existence of a suit within the jurisdiction of the District Court as a condition precedent to an intervention, *Kendrick v. Kendrick*, 16 F. 2d 744 (5th Cir. 1927) and its progeny. This was not present in this case.

This Court should grant Magee's application for certiorari, reverse the Court of Appeals for the Fifth Circuit, and dismiss Magee's intervention without prejudice.

Respectfully submitted,

RICHARD K. INGOLIA
Counsel for Petitioner
BERKE & INGOLIA
A PROFESSIONAL LAW CORPORATION
Attorneys for Magee Drilling Company
200 Oil & Gas Building
1100 Tulane Avenue
New Orleans, Louisiana 70112
Telephone (504) 525-7703

APPENDIX A

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

ARKOMA ASSOCIATES	*	CIVIL ACTION
	*	
VERSUS	*	NO. 85-2295
	*	
C. TOM CARDEN AND LEONARD L. LIMES	*	SECTION "D"
	*	
* * * * * * * * * * * * *	*	MAG. DIV. 4

MEMORANDUM IN SUPPORT OF MAGEE DRILLING COMPANY'S MOTION TO INTERVENE

MAY IT PLEASE THE COURT:

STATEMENT OF THE CASE

The Statement of the case is contained in the Defendants' memorandum in support of their motion to amend their answer and counterclaim which is filed in conjunction with Magee Drilling Company's (hereafter "Magee") motion to intervene.

STATEMENT OF THE FACTS

The statement of the facts of this case is set out in defendants' memorandum in support of their motion for summary judgment.

ARGUMENT

Intervention is governed by Federal Rule of Civil Procedure number 24 which reads in pertinent part as follows:

> "(a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.
>
> (b) Permissive Intervention. Upon timely application anyone may be permitted to intervene in an action: ~~(1) when~~ a statute of the United States confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common . . . "

This rule was interpreted by the Fifth Circuit in the case of *Stallworth v. Monsanto Company,* 558 F 2d 257 wherein the trial court's refusal to allow plaintiff's intervention was reversed, the Fifth Circuit holding:

> From 558 F 2d 257 at page 268
>
> "Under Rule 24(a)(2) an individual is entitled to intervention as of right . . . [1] when [he] claims an interest relating to the property or transaction which is the subject of the action and [2] he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, [3] unless [his] interest is adequately represented by existing parties."

Since Magee is the lessee in the lease which Plaintiff seeks to enforce it has an interest in the transaction which is the subject of the action and hence has a right to intervene.

The defenses raised by Magee may be personal to Magee and yet reduce or eliminate the liability of defendants as Magee's guarantors. Such matters should be considered at the same time as the action filed by plaintiffs and disposed of in one suit rather than two or more.

CONCLUSION

The Court should grant Magee's motion to intervene.

Respectfully submitted,

BERKE & INGOLIA
A PROFESSIONAL LAW CORPORATION
Co-Counsel for Magee Drilling Company
200 Oil & Gas Building
1100 Tulane Avenue
New Orleans, LA 70112
Telephone: 504/525-7703

By: /s/ Richard K. Ingolia
Richard K. Ingolia

/s/ Joseph M. Perry, Jr.
JOSEPH M. PERRY, JR.
Co-Counsel for Magee Drilling Company
3850 North Causeway Blvd.
Metairie, LA 70002
Telephone: 504/831-9951

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been served upon all counsel of record by placing the same in the U. S. Mail, postage prepaid, this 31st day of December, 1985.

/s/ Richard K. Ingolia
RICHARD K. INGOLIA

PC1
ARKOMA2